

**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.)

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

I. INTRODUCTION

On December 31, 2018, parties including the Office of the Ohio Consumers' ("OCC") filed comments¹ for protecting consumers from marketing practices that mislead them in the choices they make for electricity. Practices that can cause confusion for consumers include the use by marketer FirstEnergy Solutions of the same corporate name that the FirstEnergy monopoly utilities use for their business. This problem and other problems for consumers were raised in a Report ("Compliance Audit Report") by a PUCO-hired auditor, SAGE Management Consultants, Inc. ("Auditor").²

In its Comments, OCC supported many of the findings and recommendations in the Compliance Audit Report and recommended that the PUCO adopt these findings and recommendations in a timely manner to protect the customers of the Utilities. In particular, OCC's supported the Auditor's recommendation that FirstEnergy Solutions be prohibited from using the "FirstEnergy" name in its marketing business. While OCC's

¹ OCC Comments (Dec. 31, 2018).

² Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio, Final Report (May 14, 2018).

primary recommendation is that FirstEnergy Solutions be barred from using the same name that the FirstEnergy monopoly utilities use, OCC offered as a secondary alternative the recommendation that FES should be required to pay the FirstEnergy Utilities a substantial royalty for the use of the FirstEnergy name. And the royalty revenues should be used to offset utility customers' electric bills.³ Other stakeholders such as Northeast Ohio Public Energy Council ("NOPEC"), IGS Energy ("IGS"), and Retail Energy Supply Association ("RESA") recommended some of the same or similar consumer (and market) protections.⁴ The FirstEnergy Utilities⁵, however, took issue with many of the key recommendations of the Auditor. OCC's reply comments are focused on Comments submitted by FirstEnergy. Generally, FirstEnergy's comments are without merit and are not reason to reject the findings of the Auditor. In several instances, FirstEnergy appears to misrepresent or misunderstand the underlying facts, findings, and conclusions in the Compliance Audit Report.

In particular, the PUCO should reject the FirstEnergy Utilities' position that FirstEnergy Solutions should be permitted to use the "FirstEnergy" name for its marketing business. Under what should be stringent corporate separation it is odd that the FirstEnergy Utilities are even defending the marketing practices of their competitive affiliate.

And the PUCO should, contrary to the FirstEnergy Utilities' comments otherwise, adopt the Auditor's recommendation for FirstEnergy to remove the links

³ OCC Comments at 3-4.

⁴ See NOPEC Comments at 3-5; IGS Energy Comments at 9; RESA comments at 9.

⁵ First Energy Utilities refers collectively to the Ohio Edison Company, the Toledo Edison Company, and the Cleveland Electric Illuminating Company.

between its website and the FirstEnergy Solutions website.⁶ Such linkage can be construed to be an endorsement of FirstEnergy Solutions, which is confusing to customers and presents an unfair marketing advantage. Additionally, the PUCO should require FirstEnergy to develop an addendum to the Federal Energy Regulatory Commission (“FERC”) and North American Electric Reliability Corporation (“NERC”) Critical Infrastructure Protection (“CIP”) Compliance Program, and other retail sales and customer service-related correction actions as recommended by the auditor.⁷ The purposes of these recommendations by the Auditor are to ensure there is a compliance program in place for FirstEnergy Utilities that would cover all of the Ohio Corporate Separation Plan Code of Conduct articles, to transfer the FES CRES retail sales and service responsibility to FES (not to the FirstEnergy Service Company), and to properly re-examine the FERC classification for all position once the plan for the exit of competitive commodity service is clear.⁸

II. FIRSTENERGY SOLUTIONS’ BANKRUPTCY FILING OR PURPORTED EXIT FROM PROVIDING COMPETITIVE ENERGY SERVICES DO NOT RELIEVE FIRSTENERGY UTILITIES’ DUTY OF COMPLYING WITH OHIO’S CORPORATE SEPARATION STATUTES AND RULES.

In several instances, FirstEnergy Utilities argued that the FES’s bankruptcy filing and “FirstEnergy Corp’s purported exit from providing competitive energy services” has made the Auditor’s findings or recommendations inaccurate, irrelevant, or moot.⁹ This is an overstatement.

⁶ OCC Comments at 5.

⁷ OCC Comments at 5-6.

⁸ Compliance Audit Report at 19-37.

⁹ FirstEnergy Comments at 1-2.

FirstEnergy Solutions is still in the competitive energy services businesses. Actually, First Energy Solutions has continued to market multi-year contracts to its customers, including those served by the FirstEnergy Utilities in Ohio. The sale of that business to Exelon by FirstEnergy Solutions has not either been closed or approved on a final basis. Indeed, according to litigation in the bankruptcy court, the sale of the marketing business appears in some limbo.¹⁰

The Auditor's recommendations are still accurate, relevant and FirstEnergy still has a duty to comply with Ohio's corporate separation laws and PUCO's rules on this subject. FirstEnergy's Comments should be disregarded.

III. PROTECTING OHIO CONSUMERS BY BARRING MARKETER FES FROM USING THE "FIRSTENERGY" NAME WHEN THE FIRSTENERGY UTILITIES USE THE SAME NAME FOR THEIR MONOPOLY BUSINESS IS REASONABLE AND LAWFUL. AND PROTECTING CONSUMERS BY ENDING THE LINKS BETWEEN THE WEBSITES OF THE MONOPOLY FIRSTENERGY UTILITIES AND THE COMPETITIVE MARKETER FES IS REASONABLE AND LAWFUL.

The FirstEnergy Utilities made several arguments against the findings and recommendations of the Auditor. None of these arguments are well-supported in law or reasonable.

The FirstEnergy Utilities argue that there is no evidence of affiliate bias associated with the use of the FirstEnergy name.¹¹ But the Auditor has properly and amply explained that the use of the "FirstEnergy" name by FirstEnergy Solutions could create affiliate bias and such a bias is not in the best interests of Ohioans.¹² OCC agrees.

¹⁰ NOPEC Comments at 8-10.

¹¹ FirstEnergy Comments at 12.

¹² Compliance Audit Report at 98.

And the use of a name so closely aligned with the FirstEnergy Utilities is bound to cause customer confusion. The FirstEnergy Utilities do not address the customer confusion issue. Yet, there are PUCO rules and laws that preclude unfair, misleading, or deceptive marketing.¹³

The FirstEnergy Utilities also argue that a name change will infringe on a legally protected trademark, will constitute a taking of private property without just compensation, and will violate the rights of free speech.¹⁴ But FirstEnergy's hyperbole is not backed up by any citations to cases, statutes, or any authority. And in any event, FirstEnergy's argument is without merit. The PUCO lacks jurisdiction to consider Constitutional issues. Thus, the PUCO must reject the Operating Companies' Constitutional claims.¹⁵ Similar arguments have been soundly rejected by courts in other states, which have determined that the state utility regulatory commission may restrict the misleading use of a utility affiliate's name without violating Constitutional commercial free speech protections. *See AEP Texas Commer. & Indus. Retail, Ltd. Ptnshp. v. PUC of Texas*, 436 S.W.3d 890 (Ct. App. Tex. 2014)(Restrictions on confusing or misleading affiliate branding do not violate the First Amendment); and *Illinois Power Co. v. Illinois Commerce Comm'n*, 736 N.E.2d 196 (Ill. Ct. App. 2000) (Illinois Commerce Commission may lawfully regulate confusing or misleading supplier affiliate branding).

The Comments of the FirstEnergy Utilities also challenge the Auditor's finding that the link between FES website and the FirstEnergy website could be interpreted as an

¹³ See R.C. 4928. 10 and Ohio Admin. Code 4901:1-37-04(D)(8).

¹⁴ FirstEnergy Comments at 12.

¹⁵ *Kister v. AT&T Ohio*, Case No. 11-3467-TP-CSS, Entry (February 29, 2012).

endorsement of FES’s marketing services by the Ohio utility.¹⁶ FirstEnergy alleges that the finding is “inherently speculative” and that there is no data to support this speculation.¹⁷ In arguing that such a web page linkage does not provide a competitive advantage to its affiliates, FirstEnergy Utilities points out that the link to the FirstEnergy Solutions website is to a web page dedicated to provide additional information to its customers regarding FES’s Chapter 11 bankruptcy.¹⁸ But this argument by the FirstEnergy Utilities is not a valid rebuttal to the Auditor’s recommendation.

It should be noted any web link is dynamic and can be established or terminated with a few key strokes. In the instance cited by FirstEnergy, the current linked page was dedicated to information on FES’s Chapter 11 bankruptcy. But this linked page can be easily switched to a page where FES posts its market offers. Consequently, one effective way to prevent any affiliation bias resulting from the linkage of the web pages is to prohibit any linkage between the FES website and the FirstEnergy Utilities websites. The PUCO could also prohibit any other use, including but not limited to any use to market competitive electric services on the FirstEnergy website. The Auditor’s recommendation on de-link the two websites should be adopted.

¹⁶ Id. at 13.

¹⁷ Id.

¹⁸ Id.

IV. THE FIRSTENERGY UTILITIES LACK A SEPARATE OHIO CORPORATE SEPARATION RULE COMPLIANCE PROGRAM. FOR CONSUMER PROTECTION THE PUCO SHOULD ORDER THE FIRSTENERGY UTILITIES TO DEVELOP AN ADDENDUM TO THE FERC AND NERC CRITICAL INFRASTRUCTURE PROTECTION COMPLIANCE PROGRAMS THAT, SUBJECT TO PUCO APPROVAL, WILL PROTECT CONSUMERS.

The Auditor recommended that FirstEnergy Utilities develop an Ohio corporate separation compliance program.¹⁹ FirstEnergy Utilities did not dispute that they rely on the FERC Rule Compliance Program in meeting the requirement of Ohio Corporate Separation Plan Code of Conduct Articles.²⁰ The FirstEnergy Utilities also do acknowledge that the FERC Rule Compliance Program they rely on is incomplete and insufficient in meeting Ohio's Corporate Separation requirements.²¹ But in their Comments, the FirstEnergy Utilities fail to explain exactly how they are going to develop an Ohio compliance program that fills the gap.

The existing FERC Rules Compliance Program and the NERC CIP Compliance Program are not sufficient to meet the Ohio Corporate Separation requirements.²² The FirstEnergy Utilities do not dispute that conclusion in their Comments. An addendum must be developed and implemented by the FirstEnergy Utilities, for consumer protection. FirstEnergy's Comments in this area, as detailed in their pages 2 to 7, should be rejected. The Auditor's findings and recommendations, as discussed in OCC's Comment pages 5 to 8, should be adopted.

¹⁹ Compliance Audit Report at 19.

²⁰ FirstEnergy Comments at 2.

²¹ Id.

²² See Ohio Adm. Code 4901:1-37.

As discussed earlier, if these recommendations by the Auditor are adopted by the PUCO, there will be a full compliance program in place for FirstEnergy Utilities that would cover all of the Ohio Corporate Separation Plan Code of Conduct articles. In addition, there will be a proper allocation of all personnel and responsibility for competitive electricity retail sales and service to FirstEnergy Solutions and not to the FirstEnergy Utilities or other affiliated companies.

V. CONCLUSION

Ohio's corporate separation rules are intended, for consumer protection, to foster a level playing field where all market participants can compete freely and fairly for consumers' business. The rules should prevent an unfair competitive advantage for certain participants, prevent cross-subsidization between regulated and unregulated affiliates, and prohibit the abuse of market power by the regulated utility or other market participants.²³ These issues are important to customers who rely on the competitive market to produce reasonably priced retail electric generation service under the policy of Ohio in R.C. 4928.02(A). . And the issues are important to customers who could be subjected to paying more if their utility is subsidizing an affiliate such as FirstEnergy Solutions.

The independent auditor in this proceeding has made reasonable recommendations for changes to the way that FirstEnergy and its marketing affiliate operate. And stakeholders have made recommendations for consumer protection, as OCC described. Changes to protect consumers should be adopted by the PUCO.

²³ Ohio Adm. Code 4901:1-37-02.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was served via electronic transmission, to the persons listed below, on this 7thst day of January 2019.

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