

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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.)	Case No. 17-974-EL-UNC
4928.17 and Ohio Adm.Code Chapter)	
4901:1-37.)	

SUPPLEMENTAL COMMENTS OF INTERSTATE GAS SUPPLY, INC.

I. INTRODUCTION

The purpose of a corporate separation plan is to ensure that an electric distribution utility ("EDU") does not provide any of its affiliates or part of its own business with an undue preference or advantage.¹ In this proceeding, the Audit Report and stakeholders have uncovered insufficiencies within the corporate separation plan of Ohio Edison Company, Toledo Edison Company, and Cleveland Electric Illuminating Company (collectively "FirstEnergy"). Therefore, the Commission should adopt the recommendations provided in the Audit Report and by stakeholders to apply to ***all*** unregulated affiliates of the FirstEnergy EDUs, as well parts of FirstEnergy's own business.

As noted in its Initial and Reply Comments, Interstate Gas Supply, Inc. ("IGS") supports the recommendations contained in the Audit Report that identify anticompetitive advantages that the FirstEnergy utilities have extended to their competitive affiliate, at the time, FirstEnergy Solutions ("FES").² However, while the Audit Report correctly identified

¹ See R.C. 4928.17(A)(3).

² IGS Initial Comments at 10-11, 15-17.

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, and whether additional action is needed to bring FirstEnergy’s practices into compliance with Ohio law and Commission precedent.

In these Supplemental Comments, IGS renews the concerns previously raised in its Initial and Reply Comments submitted in this proceeding. The addition of a new competitive affiliate does not change the purpose of corporate separation plans or the prohibition on providing anticompetitive subsidies. In fact, because of the overlapping businesses of FirstEnergy and its new competitive affiliate, the need for a lawful and complete corporate separation plan has only heightened.

II. BACKGROUND

In the *Retail Market COI*, the Commission ordered that each of the Ohio EDUs would be subject to an audit to ensure their compliance with the corporate separation laws in R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37, as well as to further Ohio's policies pursuant to R.C. 4928.02.³ This proceeding was opened in order to fulfill this directive. In order to assist the Commission, the Commission selected an auditor, Sage Management Consultants, LLC (“Sage”), to draft a report assessing FirstEnergy’s compliance with the corporate separation laws and rules. Parties submitted comments in December 2018 and January 2019 in response to the findings in the Audit Report.

While the comments were pending before the Commission, on March 20, 2020, FirstEnergy filed a notice in this proceeding. FirstEnergy represented that FES had

³ *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market (“Retail Market COI”)*, Case No. 12-3151-EL-COI, Finding and Order (Mar. 26, 2014) at 16-17.

emerged from bankruptcy as Energy Harbor Corp. (“Energy Harbor”) and that Energy Harbor is no longer an affiliate of the EDUs’ parent, FirstEnergy Corp.⁴

Additionally, on April 22, 2020, the Commission granted the application of Suvon, LLC d/b/a FirstEnergy Advisors (“Suvon” or “FirstEnergy Advisors”), an affiliate of FirstEnergy, for certification as a competitive retail electric supply (“CRES”) power broker and aggregator in the state of Ohio.⁵ The Commission also ruled that, although various parties in that case had raised issues both with Suvon’s use of a trade name and with compliance with the corporation separation requirements by FirstEnergy and other affiliates of FirstEnergy Corp., those issues were best addressed in this proceeding.⁶

In light of both the emergence of Energy Harbor from bankruptcy and the Commission’s ruling in Suvon’s certification case, the attorney examiner found that interested persons should have the opportunity to file supplemental comments and supplemental reply comments regarding the Audit Report filed in this proceeding.⁷

III. COMMENTS

A. FirstEnergy’s Corporate Separation Plan does not comply with R.C. 4928.17, and therefore, must be amended.

IGS urges the Commission to not allow a key component of this proceeding to be lost – FirstEnergy’s Corporate Separate Plan fails to comply with R.C. 4928.17. When the

⁴ Entry at ¶ 7.

⁵ *In the Matter of the Application of Suvon, LLC (“Suvon Case”),* Case No. 20-103-EL-AGG, Finding and Order (Apr. 22, 2020) at ¶ 22.

⁶ *Id.* at ¶ 20, 22.

⁷ Given the broad range of opposition in Suvon’s certification case, IGS anticipates that many parties will seek to intervene and file comments in this proceeding consistent with the views expressed by IGS. Permitting additional parties to intervene after the deadline will contribute to the development of the record.

Commission directed these audits in the *Retail Market COI*, it specifically stated the plan would be reviewed for compliance with the corporate separation laws in R.C. 4928.17 and Ohio Adm.Code Chapter 4901:1-37, as well as to further Ohio's policies pursuant to R.C. 4928.02.⁸ Indeed, this proceeding is titled “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 Ohio Adm.Code Chapter 4901:1-37 (emphasis added).” Compliance with R.C. 4928.17 must be reviewed.

Further, as noted in IGS’ Initial Comments, the recommendations provided by the Audit Report do not remedy these concerns.⁹ Plus, the addition of Suvon, operating as FirstEnergy Advisors, to the FirstEnergy family amplifies the concerns. Therefore, the Commission should require FirstEnergy to modify its Corporate Separation Plan in order to be in compliance with R.C. 4928.17.

1. FirstEnergy’s Corporate Separation Plan does not comply with R.C. 4928.17.

Ohio’s corporate separation requirements are set forth in R.C. 4928.17 and Ohio Adm.Code 4901:1-37. Specifically:

“[N]o electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves [the three requirements provided in R.C. 4928.17(A)(1)-(3)].¹⁰

⁸ *Retail Market COI*, Finding and Order (Mar. 26, 2014) at 16-17.

⁹ IGS Initial Comments at 15-16.

¹⁰ R.C. 4928.17(A).

The first requirement is that the corporate separation audit “provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility.”¹¹ This is where, as the Audit reveals, FirstEnergy’s Corporate Separation Plan first fails to comply with R.C. 4928.17.

As noted in the Audit, the FirstEnergy EDUs offer, through the “FirstEnergy Products” business unit, products and services other than noncompetitive retail electric service.¹¹ For example, the EDUs offer products like smart thermostats and smart light bulbs with cameras, speakers, or Wi-Fi boosters, and services such as appliance warranties and electrician referrals.¹² Perhaps FirstEnergy describes this best with the heading displayed on the current website for these products and services: “We bring you more than just electricity. Check out our other offerings below.”¹³

Thus, FirstEnergy is engaged in this state in the business of supplying a noncompetitive retail electric service and products and services other than retail electric service. Under R.C. 4928.17(A), FirstEnergy is unable to do this without a Commission approved plan that provides, at a minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility.¹ FirstEnergy’s plan fails to do so, and thus, is in violation of R.C. 4928.17.

Additionally, FirstEnergy’s Corporate Separation Plan fails to comply with the second and third requirement of a corporate separation plan which prevent unfair

¹¹ Audit Report at 94.

¹² *Id.*

¹³ FE Products and Services, <https://www.firstenergycorp.com/products/products-services.html> (accessed May 27, 2020).

advantages flowing from the EDU to any of its affiliates or part of its own business. As discussed in IGS' Initial Comments, this includes actions such as providing access to the utility bill to only the part of the EDU's business that provides nonelectric products and services to the exclusion of other suppliers.¹⁴

These concerns are only amplified by the addition of Suvon, operating as FirstEnergy Advisors, into the FirstEnergy family. Unlike FES, Suvon offers nonelectric products and services, some of which are also offered by the FirstEnergy EDUs.¹⁵ According to its application, Suvon offers home connections for cable and internet and home repair services in Ohio.¹⁶ Likewise, according to its website, the FirstEnergy EDUs also offer home connections for cable and internet and home repair services.¹⁷ A lawful, effective corporate separation is necessary to ensure no undue advantages are provided to FirstEnergy Advisors, such as the use of utility resources without proper compensation, now that these entities will be offering the same products.

2. FirstEnergy' Corporate Separation Plan must be amended.

Because FirstEnergy's Corporate Separation Plan is not consistent with the requirements prescribed under the law, it must be amended.

¹⁴ R.C. 4928.17(A)(2)&(3); see IGS Initial Comments at 11-16.

¹⁸ IGS notes that Ohio Adm.Code 4901:1-37-06(A) requires that all proposed revisions to an EDU's approved corporate separation plan must be filed with the Commission, and a copy of the filing shall be provided to the Director of the Utilities Department. As that Department no longer exists, IGS is providing a copy of this filing, as noted on the Service List, to the Director of Rates and Analysis.

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Under R.C. 4928.17(D), “[a]ny party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.” Thus, in this proceeding, IGS seeks an amendment to FirstEnergy’s Corporate Separation Plan, or, in the alternative, IGS urges the Commission to use its authority under this statute to order the filing of an amended plan on its own initiative.¹⁸ At a minimum, the Commission should amend the plan to remove the ability of FirstEnergy to offer products and services other than retail electric service.¹⁹

IGS submits there are changed circumstances that must be reflected in FirstEnergy’s Corporate Separation Plan. The first of which is the addition of Suvon, which has been operating in Ohio since at least September 2019.²⁰ The Commission’s rules require a corporate separation plan to include “[a] list of all current affiliates identifying each affiliate’s product(s) and/or service(s) that it provides.”²¹ It also expressly contemplates periodic updates to corporate separation plans.²² Thus, FirstEnergy should be directed to amend its plan to reflect this.

¹⁸ IGS notes that Ohio Adm.Code 4901:1-37-06(A) requires that all proposed revisions to an EDU’s approved corporate separation plan must be filed with the Commission, and a copy of the filing shall be provided to the Director of the Utilities Department. As that Department no longer exists, IGS is providing a copy of this filing, as noted on the Service List, to the Director of Rates and Analysis.

¹⁹ See FirstEnergy Corporate Separation Plan, Section VI, Consumer Products.

²⁰ *Suvon*, Application at Ex. A-13.

²¹ Ohio Adm.Code 4901:1-37-05(B)(3).

²² Ohio Adm.Code 4901:1-37-06(A).

Second, the Supreme Court of Ohio and the Commission have changed the circumstances surrounding the application of R.C. 4928.17. In *Duke*, the Court remanded Duke's Fourth Corporate Separation Plan back to the Commission because the Commission failed to set forth the evidence and reasoning as to how it determined Duke's plan complied with R.C. 4928.17, despite it allowing Duke to offer nonelectric products and services.²³ Although the majority court was "admittedly skeptical" as to whether the plan could comply with the statute, Justice Kennedy, in an opinion that dissented in part and concurred in part, took the additional step concluding that it could not. In its Order on Remand, the Commission agreed with Justice Kennedy.²⁴

Notably, the Commission specifically held that a plan allowing an EDU to offer nonelectric products and services does not comply with R.C. 4928.17(A) because these products and services are not being offered through an affiliate.²⁵ Additionally, the Commission held that "by not offering the nonelectric services through an affiliate, Duke's plan disregards the state policy in R.C. 4928.02(H) to ensure effective competition."²⁶

Thus, now that the Commission has expressly held that a corporate separation plan does not comply with R.C. 4928.17 when the EDU is offering nonelectric products

²³ *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, Case Nos. 14-689-EL-UNC, Order on Remand (June 14, 2017) at ¶ 29, citing *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, 148 Ohio St.3d 510, 2016-Ohio-7535.

²⁴ *Id.* at ¶ 9.

²⁵ *Id.* at ¶ 10. ("Initially, we note that Duke's request does not comply with 4928.17(A) as the Company admittedly is not seeking to offer nonelectric products through an affiliate.").

²⁶ *Id.*

and services, it should require FirstEnergy to update its Corporate Separation Plan to reflect this change.

In the alternative, IGS urges the Commission to use its ability in R.C. 4928.17(D) to amend FirstEnergy's Corporate Separation Plan upon its own initiative. Indeed, when the Commission approved FirstEnergy's Corporate Separation Plan it "reserve[d] the right to invoke its authority to preserve fair competition, for both interim and permanent arrangements."²⁷ Allowing an EDU to continue to operate under an unlawful corporate separation plan is certainly an appropriate time to invoke its authority. Therefore, FirstEnergy's Corporate Separation Plan should be modified to comply with R.C. 4928.17.

B. The Commission should adopt the recommendations regarding the anticompetitive advantages to ensure the FirstEnergy EDUs cannot extend to them to any affiliate, including the use of the "FirstEnergy" name.

The removal of FES as an affiliate of FirstEnergy does not remove the concerns of anticompetitive advantages identified in the Audit Report or raised by stakeholders. A corporate separation plan must "ensure that the utility will not extend any undue preference or advantage to *any* affiliate," not one specific affiliate.²⁸ Thus, the Commission should adopt and apply the recommendations to all of FirstEnergy's unregulated affiliates to ensure that FirstEnergy will not extend undue preference to these entities.

²⁷ *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, Opinion and Order (Jul. 19, 2000) at 26.

²⁸ R.C. 4928.17(emphasis added).

For example, the auditor determined that an unfair advantage had been conveyed to FES through direct links found on FirstEnergy's webpage.²⁹ The Commission should not simply prohibit FirstEnergy from including a link to FES' website, rather the Commission should prohibit links between the FirstEnergy website and any competitive affiliate operating in Ohio. Likewise, the Audit Report provided recommendations regarding the "highly inappropriate" relationship between FirstEnergy Product's regulated activities and FES' unregulated activities.³⁰ Thus, the Commission should adopt these recommendations for application to all competitive affiliates.

One anticompetitive advantage that is especially concerning is the use of the FirstEnergy name by an unregulated affiliate. Under FirstEnergy's Corporate Separation Plan Code of Conduct, the EDUs are prohibited from indicating that a CRES provider is an affiliate unless specifically asked by customer or third-party.³¹ However, the auditor determined that it would be virtually impossible for the FirstEnergy EDU representatives to not "indicate that an electric services company is an affiliate" as they share the name.³² Therefore, the auditor recommended the FirstEnergy name be removed from FirstEnergy's competitive affiliate to eliminate affiliate basis.³³

IGS agrees. Allowing Suvon to operate as FirstEnergy Advisors in Ohio will almost certainly confuse customers, especially in light of the fact that both FirstEnergy and

²⁹ Audit Report at 48.

³⁰ *Id.* at 34.

³¹ *Id.* at 98.

³² *Id.*

³³ *Id.* at 46, 98.

FirstEnergy Advisors will be offering the same nonelectric product and services to Ohioans. Further, the Ohio Administrative Code makes it explicitly clear that any solicitation that would lead a customer to believe that the CRES provider is anything other than the CRES provider is expressly prohibited.³⁴

In addition, FirstEnergy Advisors would immediately be provided the benefits of the FirstEnergy marketing budget, which is supported in part through distribution rates. “Executives in this program tout the importan[ce] [sic] of using the FirstEnergy name with FirstEnergy products, saying FirstEnergy is a ‘trusted supplier’ and the ‘FirstEnergy brand is prominent.’”³⁵ The auditor recognized that FirstEnergy works hard on its stand-alone branding, noting the Cleveland Browns stadium is a “FirstEnergy Stadium.”³⁶ In fact, just one person is responsible for the advertising and branding of the EDUs and their competitive affiliate.³⁷ Thus, the EDUs would be providing an unfair advantage to any affiliate that shares its name.

Additionally, the use of FirstEnergy Advisors is inconsistent with the provision of FirstEnergy’s Corporate Separation Plan, which clearly states that it will not participate in any joint marketing with any unregulated affiliate.³⁸ As of this filing, FirstEnergy has not amended their corporate separation plan to incorporate a plan to successfully jointly advertise and market with a closely held affiliate.

³⁴ Ohio Adm.Code 4901:1-21-05(C)(10).

³⁵ Audit Report at 98.

³⁶ *Id.*

³⁷ *Id.* at 93.

³⁸ Case No. 09-462-EL-UNC, Corporate Separation Plan (June 1, 2009) at 6.

Indeed, the state of Texas reached a similar conclusion. In *AEP v. PUCT*, a Texas Circuit Court upheld the Commission's determination that the sharing of the AEP name and red parallelogram logo by both the EDU and its competitive affiliate violates the prohibition on joint advertising and promotional activities that favor a competitive affiliate.³⁹ In making this determination, the Court noted that the Commission considered the retail customers to whom the advertisements or promotions will be directed, noting that use of the AEP name by the EDU and affiliate would, "in the eyes of retail consumers, promote all of these entities and their products collectively and effectively leverage each entity's advertising, brand identity, and goodwill to the benefit of the others."⁴⁰ Additionally, the Court recognized that the Texas legislature has charged the Texas Commission with preventing cross-subsidizations between regulated and competitive activities and fostering a fully competitive power industry.⁴¹

The facts are identical here. Like in Texas, this Commission is charged by the General Assembly to prevent the flow of subsidies between an EDU and its affiliates and to foster competition within the retail electric market. Additionally, FirstEnergy is also unable to market to jointly market and advertise with its competitive affiliates.⁴² And as noted above, FirstEnergy has made substantial efforts to promote the "FirstEnergy" brand, which allows FirstEnergy Advisors to leverage this "trusted supplier" and

³⁹ *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) at 33. Additionally, the Court also rejected claims that prohibiting the use of the name would violate the utility's freedom of speech.

⁴⁰ *Id.* at 34.

⁴¹ *Id.* at 8.

⁴² See Case No. 09-462-EL-UNC, Corporate Separation Plan (June 1, 2009) at 6.

“prominent brand” identity with customers. Thus, IGS urges the Commission to prohibit the use of the FirstEnergy name for any competitive affiliates in Ohio.

IV. CONCLUSION

For the reasons set forth above, IGS recommends that the Commission adopts the comments submitted by IGS in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this *Supplemental Comments of Interstate Gas Supply, Inc.* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on May 29, 2020. The PUCO's e-filing system will electronically serve notice of the filing on the subscribed parties. Additionally, the parties below have received a copy of this filing via electronic transmission.

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5/29/2020 4:23:43 PM

in

Case No(s). 17-0974-EL-UNC

Summary: Comments Supplemental Comments of Interstate Gas Supply, Inc. electronically filed by Bethany Allen on behalf of Interstate Gas Supply, Inc.