

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.)	

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

I. SUMMARY

Under no circumstances should the “FirstEnergy” name be used to provide or market competitive retail electric service (“CRES”) in Ohio. As a threshold matter, the Northeast Ohio Public Energy Council (“NOPEC”) agrees with the recommendation of SAGE Management Consultants, LLC (“SAGE”) that FirstEnergy Solutions Corp. (“FES”) be required to immediately cease using the “FirstEnergy” name. SAGE made its recommendation because such use violates the Code of Conduct in the FirstEnergy Operating Companies’¹ corporate separation plan.²

Importantly, SAGE’s Audit Report was filed before significant developments occurred in FES’s ongoing Chapter 11 bankruptcy proceeding.³ These developments provide additional, compelling reasons why FES must be ordered to immediately cease using the “FirstEnergy” name, and include:

¹ 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.

² See SAGE Management Consultants, LLC 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 98-99.

³ See *In re FirstEnergy Solutions Corp.*, Bankr. N.D. Ohio No. 18-50757 (Jointly Administered) (hereinafter “*FES Bankruptcy Proceeding*”).

1. FEC's repeated and publicly expressed commitment to exit the competitive generation business;
2. FEC's actions taken to exit the competitive generation business, including:
 - a. FES's agreement to sell its Ohio retail customer contracts to another competitive retail electric supplier;
 - b. FEC's steps to sell or deactivate its competitive generating facilities; and
 - c. FEC's procurement of an order from the Bankruptcy Court that releases FEC from its responsibilities and obligations to FES, effectively disassociating FES from FEC and its affiliates; and
3. FES's recent decision, as an alternative to selling its retail customer contracts, to work with a group of its creditors who may wish to retain all or part of FES's retail of book of business.

As the Audit Report found, FEC branded FES with the "FirstEnergy" name to connote to customers that FES is a part of the customers' traditional utility company and that, if the customers choose FES to supply their electricity, they would receive service from their same "trusted utility supplier." Audit Report at 98. FEC's actions described above, whether FES sells or retains its retail customer contracts, demonstrate that FES is not a part of the traditional utility company, and its branding as such constitutes an unfair, misleading, and deceptive marketing practice in violation of R.C. 4928.10 and O.A.C. 4901:1-21-05(C).

NOPEC respectfully requests that the Public Utilities Commission of Ohio ("PUCO") require FES to cease using the "FirstEnergy" name immediately because it (1) violates the Operating Companies Code of Conduct and O.A.C. 4901:1-37-04(D)(7), and (2) is an unfair, misleading, and deceptive marketing practice that violates R.C. 4928.10 and O.A.C. 4901:1-21-05(C).

II. THE PUCO SHOULD ADOPT THE SAGE AUDIT REPORT AND RECOMMENDATION; FIND THAT FES'S CURRENT USE OF THE "FIRSTENERGY" NAME IS UNLAWFUL; AND ORDER FES IMMEDIATELY TO CEASE USING THE "FIRSTENERGY" NAME; REMOVE THE LINKS BETWEEN THE FEC AND FES WEBSITES; AND CEASE ALL MARKETING INITIATIVES.

Pursuant to a Commission order issued March 26, 2014, each Ohio EDU was to undergo an audit to ensure compliance with Ohio's statutes and rules governing the corporate separation of Ohio's monopoly EDUs and their affiliated CRES providers.⁴ SAGE was selected to perform the Operating Companies' audit and filed its final Audit Report on May 14, 2018. The Audit Report correctly recommends that FES be required to remove "FirstEnergy" from its name, and to remove the links between the FirstEnergy and FES websites, to eliminate the inherent affiliate bias. Audit Report at 46, 98-99.

To support its recommendation, the Audit Report notes that FEC works hard to promote its brand name in Ohio, for example, by acquiring the naming rights for the Cleveland Browns' stadium, and re-naming it "FirstEnergy Stadium." These stand-alone branding successes then are applied to FEC's subsidiaries either as a part of their names (*e.g.*, FirstEnergy Solutions; FirstEnergy Products), or in the Operating Companies' descriptions (*e.g.*, Ohio Edison, A FirstEnergy Company). Audit Report at 97-98.

The Operating Companies provided vertically integrated monopoly service (generation, distribution and transmission services) to their customers for decades before the advent of competitive retail generation service in Ohio in 2000. They continue to provide monopoly distribution and transmission service to all consumers in their service territories as EDUs. As the Audit Report finds, the widespread use of the "FirstEnergy" name is to connote to these customers that FES is a part of the FirstEnergy family that has been providing "trusted utility

⁴ See *In re the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI.

service” for years. The natural result of this branding campaign is that when customers are given a list to choose a potential CRES provider, including lists from the Operating Companies’ representatives, the customers will give greater consideration to FES in making their decisions. Audit Report, at 98.

The Audit Report concluded that FES’s use of the “FirstEnergy” name violated the Operating Companies’ Code of Conduct in their corporate separation plan. The Code of Conduct provision cited is a reiteration of 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 other CRES suppliers. *Id.*

FES’s continuing use of the “FirstEnergy” name violates the following Code of Conduct provisions in the Operating Companies’ corporate separation plan, contained in the Ohio Administrative Code: O.A.C. 4901:1-34-04(D)(7) (quoted above), as well as O.A.C. 4901:1-37-04(D)(9), (“[e]mployees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated electric services company”). FES’s actions also violate R.C. 4928.17(A), because by violating these rules it is not operating under its approved corporate

separation plan. Considering that FES's use of the FirstEnergy brand is unlawful, NOPEC respectfully requests that the PUCO adopt the Audit Report recommendations and order FES to immediately cease using the "FirstEnergy" name, remove the links between the FEC and FES websites, and cease all marketing initiatives.

III. DEVELOPMENTS RELATED TO FES'S CHAPTER 11 BANKRUPTCY PROCEEDING PROVIDE ADDITIONAL AND COMPELLING REASONS TO REQUIRE FES TO CEASE USING THE "FIRSTENERGY" NAME AND ALL MARKETING INITIATIVES THEREUNDER.

A PUCO order that FES cease using the "FirstEnergy" name is even more compelling considering that FEC repeatedly has stated its intent to exit the competitive generation business, and has acted on its intent through actions related to the pending bankruptcy proceeding. Specifically, subsequent to the Audit Report's issuance, and as discussed further below:

1. FES moved for an order of the Bankruptcy Court to approve the Asset Purchase Agreement ("APA") on July 9, 2018, to sell its existing customer retail contracts to Exelon Generation Company, LLC ("Exelon");⁵
2. FEC took steps to sell or retire its generating facilities;⁶ and
3. FEC entered into a settlement agreement, approved by the Bankruptcy Court on September 26, 2018, that resolves FEC's obligations and responsibilities to FES, and frees FEC to concentrate solely on its regulated businesses ("Settlement Agreement").⁷

A. The Steps to Exit the Competitive Generation Business

a. Divestiture of Competitive Generating Facilities

The PUCO is well aware of FES's financial plight from the evidence presented in the lengthy litigation in the Operating Companies' most recent electric security plan proceeding.⁸ It

⁵ *FES Bankruptcy Proceeding*, Dkt. No. 908.

⁶ *FES Bankruptcy Proceeding*, Dkt. No. 908-4.

⁷ *FES Bankruptcy Proceeding*, Dkt. No. 1465.

⁸ See *In Re Ohio Edison Company, et al.*, PUCO Case No. 14-1297-EL-SSO.

is no secret that this financial distress prompted FEC's decision to exit the competitive generation business and become a fully regulated utility company – and earn a guaranteed rate of return on its investments. FirstEnergy's CEO, Charles Jones, revealed FEC's plan to exit the competitive business as early as November 4, 2016, during the company's third quarter conference call, and repeated the plan in a press release issued March 31, 2018, the date on which FES filed its Chapter 11 petition in bankruptcy.⁹ To that end, FEC has embarked on an effort to sell or deactivate its competitive generating facilities. Indeed, as recently as August 29, 2018, FEC announced that it would be deactivating another 4,017 megawatts ("MW") of fossil fuel generating capacity; and 3,122 MW of generation from its three nuclear facilities.¹⁰

b. FEC's Intent that FES Sell its Retail Book of Business to Exelon and the Approval of the Settlement Agreement Releasing FEC from Responsibility for FES.

In addition to FEC's plan to divest its competitive generating facilities, FES entered into the APA on July 9, 2018, under which FES would sell its retail electric service contracts to Exelon. FES filed a Bidding Procedure and Sale Motion seeking approval of the APA.¹¹ By order of August 3, 2018, the Bankruptcy Court approved the APA, conditioned upon a straw man auction for which FES was to solicit competitive bids for the sale of its retail contracts.¹² FES was unable to secure other qualified bidders for the contracts, no auction took place, and Exelon became the successful bidder, subject to a final hearing on the sale ("Sale Hearing"). FES and

⁹ See <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.

¹⁰ See <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>

¹¹ *FES Bankruptcy Proceeding*, Dkt. No. 908.

¹² *FES Bankruptcy Proceeding*, Dkt. No. 1098.

FEC (among other parties) thereafter entered into the Settlement Agreement, which resolved FEC's obligations and responsibilities to FES. FEC acknowledged through press releases that the Settlement Agreement absolved it of responsibilities to FES and allowed it "to turn its full focus toward the continued successful implementation of its regulated growth strategies."¹³ The Bankruptcy Court approved the Settlement Agreement on September 26, 2018.¹⁴ Yet, FES continued to aggressively market its CRES to Ohio consumers for multi-year contracts using the FirstEnergy brand. See Attachment A.

c. FES's Continued Solicitation of Multi-Year Contracts Using the FirstEnergy Brand, When it Intends to Sell its Retail Service Contracts and Exit the Competitive Generation Business, is Unfair, Misleading and Deceptive under R.C. 4928.10 and O.A.C. 4901:1-21-05(C).

FEC has repeatedly and publicly expressed its commitment to exit the competitive generation business, and has taken significant steps to do so through the divestiture of its generating fleet and the sale of FES's existing retail customer contracts to Exelon. Nevertheless, during the pendency of the Bankruptcy Court's approval of the APA, FES has continued to market multi-year contracts to prospective customers by playing upon their familiarity with, and desire to be served by, the "trusted" FirstEnergy brand, as acknowledged in the Audit Report. Marketing multi-year contracts under the "FirstEnergy" name, when FEC has committed to leave the competitive generation business, is unfair, misleading and deceptive under R.C. 4928.10 and O.A.C. 4901:1-21-05(C). Because customers currently are being harmed by FES's misleading and deceptive marketing practices, as well as the Code of Conduct violations noted by SAGE,

¹³ See FEC press release announcing the Settlement Agreement (Attachment D) (https://www.firstenergycorp.com/content/fecorp/newsroom/news_articles/firstenergy-enters-definitive-settlement-agreement-with-key-part.html); see, also, press release announcing the Bankruptcy Court's approval of the Settlement Agreement (Attachment E) (https://www.firstenergycorp.com/newsroom/news_articles/firstenergy-s-settlement-agreement-approved-in-fes-bankruptcy-ca.html).

¹⁴ *FES Bankruptcy Proceeding*, Dkt. No. 1465.

the PUCO should order FES to immediately cease using the “FirstEnergy” name and all marketing initiatives thereunder.

NOPEC is aware these violations could cease in the near term, considering that FES’s certificate to provide CRES expires May 1, 2019.¹⁵ If FES ceases providing CRES in Ohio, consumers no longer will be taken advantage of by FES’s misleading and deceptive marketing practices. In addition, current customers whose contracts are sold to Exelon will receive protection by the notice provisions of the PUCO’s assignment rules,¹⁶ to indicate that FES no longer is serving them. Similarly, with the expiration of FES’s certificate, Code of Conduct violations would disappear. However, recent representations to the Bankruptcy Court that FES is considering retaining all or some of its retail contracts, and will continue to operate as a CRES, make it more imperative for the PUCO to accept the Audit Report’s recommendation and require FES to cease using the “FirstEnergy” name immediately to prevent continued harm to customers over the long term.

B. If FES’s Alternative Reorganization Plan is Adopted and it Continues to Provide CRES in the Future, the PUCO is Compelled to Protect Ohio Consumers Over the Long Term by Requiring that the FES Cease Using the “FirstEnergy” Name.

FES’s sale of its retail contracts and exit from Ohio CRES market is becoming more and more unlikely. FES is required to receive the Bankruptcy Court’s approval of the APA. The Bankruptcy Court set the hearing to consider the sale of FES’s customer contracts for September 21, 2018 (“Sale Hearing”).¹⁷ However, since then, FES has adjourned the Sale Hearing a total of six (6) times.¹⁸ Due to this delay, Exelon filed a complaint against FES alleging that it had

¹⁵ See *In Re Certification of FirstEnergy Solutions*, PUCO Case No. 00-1742-EL-CSS, Motion (October 22, 2018), Entry (October 26, 2018).

¹⁶ See O.A.C. 491:1-21-11(D).

¹⁷ *FES Bankruptcy Proceeding*, Dkt. No. 1098, at 8.

¹⁸ *FES Bankruptcy Proceeding*, Dkt. No. 1363, 1487, 1555, 1601, 1736, 1820.

breached the APA by failing to use reasonably commercial efforts to obtain a sale order by November 6, 2018.¹⁹ Importantly, in response to an Exelon demand letter, FES claimed that it was not in breach of its obligations under the APA, and further that FES was not bound in any respect by the APA.²⁰ The date of the Sale Hearing now is scheduled for January 25, 2019. The Bankruptcy Court recently scheduled an evidentiary hearing for February 4, 2019, on the allegations contained in Exelon's complaint in the Adversary Proceeding.²¹

These delays and FES's comments reflect that the sale of FES's retail contracts is in considerable jeopardy. The sale to Exelon is made even more improbable by FES's answer to Exelon's complaint in which it admitted that a group of its creditors have been attempting to develop an alternative reorganization plan that "may contemplate FES retaining the [customer contracts]."²² FES further admitted that these creditors "did not want FES to move forward with the Sale Hearing while they were still attempting to formulate this alternative reorganization plan,"²³ and that its creditors have continued to request additional time to consider the sale to Exelon.²⁴ Notably, in its October 23, 2018 motion to extend the time for filing and acceptance of its reorganization plan to May 24, 2019, FES stated that it "continue[s] to pursue a dual-path exit from chapter 11 in which they simultaneously work towards a creditor-supported plan of reorganization while maintaining the option of pursuing potential sale transactions for some or all of the assets owned by the Debtors."²⁵

¹⁹ *Exelon Generation Company, LLC v. FirstEnergy Solution Corp.*, Bankr. N.D. Ohio No. 18-5081 (Adversary Proceeding), Dkt. No. 1 (hereinafter "*FES Adversary Proceeding*").

²⁰ *FES Adversary Proceeding*, Dkt. No. 1, at ¶ 32.

²¹ *FES Adversary Proceeding*, Dkt. No. 22, at 2.

²² *FES Adversary Proceeding*, Dkt. No. 23, at ¶ 22.

²³ *FES Adversary Proceeding*, Dkt. No. 23, at ¶ 23.

²⁴ *FES Adversary Proceeding*, Dkt. No. 23, at ¶ 24.

²⁵ *FES Bankruptcy Proceeding*, Dkt. No. 1571, at ¶ 7.

Obviously, if FES's alternative reorganization plan were approved, its continued operation as a CRES in Ohio would continue to violate the Operating Companies' Code of Conduct for the reasons detailed in the Audit Report. However, the developments in the bankruptcy proceeding make it even more compelling that the PUCO require FES to immediately cease using the "FirstEnergy" name and soliciting customers thereunder, because solicitations using the "FirstEnergy" name would be unfair, misleading and deceptive under R.C. 4928.10 and O.A.C. 4901:1-21-05(C).

As explained above, the actions taken in the bankruptcy proceeding have severed the relationship among FES, FEC and its affiliates, particularly FES's generation affiliates. The Settlement Agreement releases FEC from any responsibility or obligations to FES, and FES is in the process of selling or deactivating its generation facilities. This means that if the FES creditor group is successful in formulating a plan to retain FES's retail contracts, and continues CRES operations in Ohio, the entity emerging from bankruptcy will no longer market "FirstEnergy" produced generation and will have no relation to the EDUs. As the Audit Report recognized, the FirstEnergy brand name is meant to connote to customers traditional "trusted utility service," including service from FEC's former legacy generating assets. If those assets are divested, as proposed, FES's reliance on the FirstEnergy brand would be unfair, misleading and deceptive R.C. 4928.10 and O.A.C. 4901:1-21-05(C).

IV. CONCLUSION

Under none of these 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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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 31st day of December 2018.



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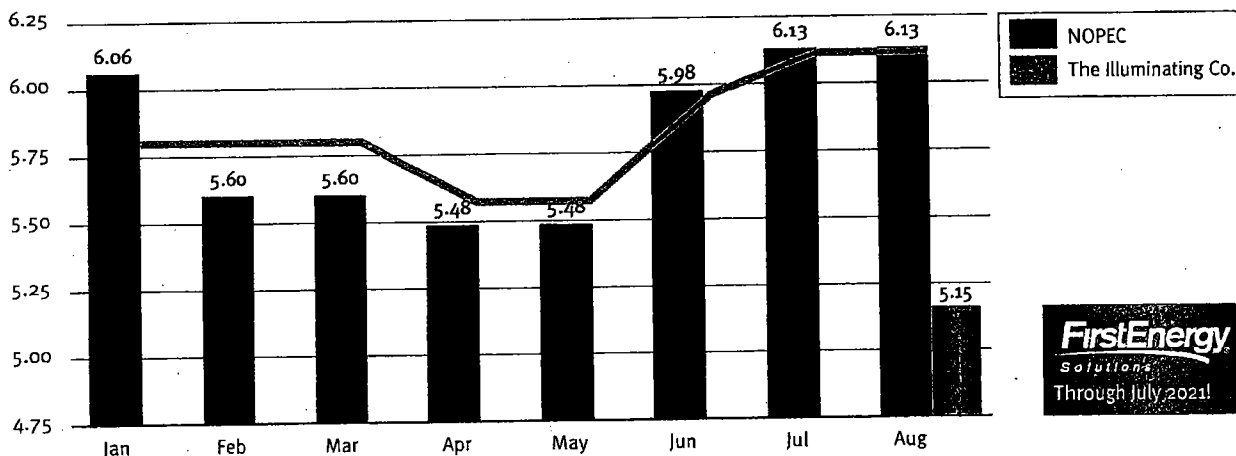
August 31, 2018

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Mentor, OH 44060-8417

For more than a decade, FirstEnergy Solutions has provided guaranteed electric savings programs to communities like yours in Northeast Ohio. But as a member of the Northeast Ohio Public Energy Council (NOPEC), your community is with a different supplier. Unfortunately, this means that you're not getting guaranteed savings, and your price can change every month!

Make the smart choice. Switch to FirstEnergy Solutions now to lock in a great low fixed price of **5.15 cents per kilowatt-hour (kWh) through July 2021**. This price is lower than your utility's rate and less than your community program's price! See for yourself:



And there's no fee to switch or to leave your community's program. Simply go online to fes.com/ceisave and enter your unique offer code: [REDACTED] Or call toll-free at 1-888-254-6359 to enroll. Just be sure you sign up before this offer ends on **September 30, 2018**.

We look forward to providing you savings in the future.

Sincerely,

Brian Farley
Vice President of Sales

Enroll by Sept. 30

fes.com/ceisave

Offer Code: [REDACTED]

The chart above compares The Illuminating Company's residential Price to Compare to the NOPEC rates as published on the Public Utilities Commission of Ohio (PUCO) and NOPEC websites between January 1 and August 1, 2018. NOPEC's price per kWh is a variable price that may change from month to month for the duration of your term. The applicable monthly price should be published on NOPEC's website at www.nopecinfo.org at least thirty (30) days prior to its effective date. All prices displayed are in cents per kWh. NextEra is the electric generation supplier contracted to serve the electric aggregation programs of the communities represented NOPEC.

FirstEnergy Solutions is an unregulated subsidiary of FirstEnergy Corp., and an affiliate of Ohio Edison, Toledo Edison and The Illuminating Company.

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