

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

IN THE MATTER OF THE REVIEW OF OHIO)	
EDISON COMPANY, THE CLEVELAND)	CASE No. 17-0974-EL-UNC
ELECTRIC ILLUMINATING COMPANY, AND)	
THE TOLEDO EDISON COMPANY’S)	
COMPLIANCE WITH R.C. 4928.17)	
)	
)	

**COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY**

INTRODUCTION

Pursuant to the Attorney Examiner’s Entry on November 30, 2018, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (“Companies”) hereby submit their comments on the audit report prepared by SAGE Management Consultants, LLC (“SAGE”) and filed with the Commission on May 14, 2018 (the “Report”). The Commission commissioned the Report as a review of the Companies’ compliance with the corporate separation rules set forth in Ohio Adm. Code Chapter 4901:1-37. The Companies were the first electric utility in the state to go through this review. The Companies appreciate the opportunity to comment and participate in this process and appreciate the Report’s acknowledgement of the diligence with which the Companies adhere to the requirements of R.C. 4928.17.

It is important to note that on March 31, 2018 – subsequent to the audit but before the issuance of SAGE’s Report – the competitive affiliate of FirstEnergy Corp., FirstEnergy Solutions Corp. (“FES”), filed for Chapter 11 bankruptcy protection. FES further deconsolidated its financial reporting from FirstEnergy Corp., which has announced its exit from the competitive energy services business. FirstEnergy Corp.’s former competitive energy services business was the focal point of several of SAGE’s recommendations, findings and comments. Because

FirstEnergy Corp. no longer provides competitive energy services, SAGE's recommendations, findings and comments related to competitive energy services are moot.

COMMENTS

In an effort to simplify the Commission's review of the Companies' comments, the Companies have ordered their comments to follow the numerical organization of the Report. Specific references to the Report are included in footnotes.

I. Executive Summary

1. FirstEnergy Corp. Business Segments – Competitive Energy Services¹

This section lists competitive energy services among the various business segments under FirstEnergy Corp.'s corporate umbrella. As stated above, however, this section is no longer accurate or relevant due to FES' bankruptcy filing and FirstEnergy Corp.'s exit from providing competitive energy services.

2. Finding I-B-5

Finding I-B-5 provides, "[t]he FERC rule compliance program does not cover all of the Ohio Corporate Separation Plan Code of Conduct Articles."² This statement, while true, is based on the incorrect premise that the FERC compliance program is intended to provide employees with the necessary resources and training on the Ohio corporate separation rules. That is not the case. While there are certain situations in which the Ohio Corporate Separation Rules and FERC training overlap, all employees are also given training in Ohio's Corporation Separation Rules as part of a

¹ Report at 8.

² Report at 28.

separate annual training that all FirstEnergy³ employees are required to take as a condition of employment. In order to complete this training process, every employee is required to review various FirstEnergy business practices, and to review and certify their awareness and understanding of the Ohio Corporate Separation Rules. This annual certification process is administered by the Companies' Corporate Separation Plan Compliance Officer. Therefore, contrary to the Report, the Companies do not rely on FERC training to comply with the Ohio Corporate Separation Rules. Given this mistaken premise underlying a number of the audit's findings, the Companies will not respond to each and every instance in which the audit incorrectly states that employees do not have access to certain provisions of the Corporate Separation Rules.

3. Finding I-B-6

Finding I-B-6 provides, "[t]he assignment of FES CRES retail sales and service responsibility to the Service Company and the designation of FES CRES sales and service leaders as Shared Services Employees is highly inappropriate."⁴ This assertion is contradicted by the structure and reporting requirements of these segments. As a point of clarification, the groups in FES Retail Sales & Marketing with sales responsibilities (Government Aggregation and Commercial and Industrial Sales) are classified as Marketing Function Employees and are FES employees. Only the Retail Operations group, which provides back office support, consists of employees of Service Company. Further, employees with FES CRES sales responsibilities are FES employees, not Service Company employees.

Moreover, the Companies disagree with the characterization of these business arrangements as "highly inappropriate." To the contrary, the classification of the Retail Operations

³ The term "FirstEnergy" as used in this document includes FirstEnergy Service Company ("Service Company") and the Companies

⁴ Report at 34.

group as Service Company employees is not without precedent. Resources such as the Retail Operations group that perform like functions and services for business units such as Information Technology, Supply Chain, and Human Resources are considered shared services. Adopting a similar structure for the Retail Operations with the necessary controls was, and is, a completely reasonable approach that does not violate any compliance requirements. Shared service resources support multiple business units and are trained to understand FERC and state compliance regulations. Leadership within these shared services can have separate staff supporting regulated functions and non-regulated functions, assuring that segmentation and system controls are initiated and validated per compliance requirements. Also, it is worth noting that this structure did not and has not resulted in any inappropriate behavior because of the requisite controls referenced above. Finally, it is important to recognize that eventually this issue will become moot, when the Service Company ceases providing back office support to FES.

4. Finding I-B-7

Finding I-B-7 notes, “[t]he FERC classification designations for Shared Services Employee and Shared Senior Officer are overused.”⁵ The Report continues, saying that “there is no apparent reason for different designations between Shared Senior Officer and Shared Services Employee. The affiliate restrictions are the same. There is no need to have separate designations.”⁶ These statements ignore the fact that FERC’s regulations allow FirstEnergy to structure its compliance programs to fit FirstEnergy’s needs; provided that the programs also satisfy FERC’s requirements. FERC has issued many orders regarding its Standards of Conduct and Affiliate Restrictions programs, and the rules and regulations that govern information sharing restrictions

⁵ Report at 35.

⁶ *Id.*

under these programs. Importantly, the rules under these programs are similar, but not the same. For example, the Standards of Conduct define the terms “*transmission function employee*” and “*marketing function employee*” and apply the Standards of Conduct *no conduit* rule based on these definitions.⁷ In contrast, the Affiliate Restrictions describe the functions that employees may perform on behalf of market-regulated power sales affiliates as compared to franchised public utility affiliates with captive customers, and mandate separation based on these functions.⁸ FERC’s Affiliate Restrictions regulations describe the permissible roles and functions of shared senior officers and members of boards of directors,⁹ while FERC’s Standards of Conduct regulations do not.

In the face of these complex, and at times changing requirements, as well as the similar state regulatory programs, FirstEnergy chose to structure its FERC and state compliance programs in a manner that clearly classified and differentiated its various groups of employees, and the respective functions and physical/functional separation requirements that were applicable to each, in order to ensure compliance with all applicable federal and state rules and regulations. Moreover, FirstEnergy’s conservative approach has proven successful, even in the face of at times incremental changes to the various regulatory requirements. Lastly, FirstEnergy current employee classifications are in compliance with all applicable FERC requirements and in harmony with Ohio’s Corporate Separation Rules.

The Report also states that “there seems to be confusion between the reason for the Service Company and the reason for the FERC employee classifications.”¹⁰ Again, the Companies’ compliance with FERC regulations exceeds the audit’s scope. Nevertheless, the reason for the

⁷ 18 CFR §§358.3(d), 358.3(i), 358.6.

⁸ 18 CFR §§ 35.39(c).

⁹ 18 CFR § 35.39(c)(2)(ii)

¹⁰ *Id.*

Service Company designation is different than the reason for the FERC employee classification. As stated in the Report, the Service Company is the vehicle to provide shared services among two or more FirstEnergy Corp. entities. On the other hand, FirstEnergy applies a FERC classification based upon the functions an employee performs. Therefore, FirstEnergy's FERC classification system does not require that employees who work for Service Company must be classified as Shared Services.

a. “[S]ome Service Company employees designated as ‘Shared Services’ were not completely familiar with their FERC designation.”¹¹

Again turning to compliance with federal regulations, the Report notes that “some Service Company employees designated as ‘Shared Services’ were not completely familiar with their FERC designation and did not understand well the restrictions that come with the designation.”¹² This is another instance in which an audit finding is based on the mistaken belief that FirstEnergy relies solely on the FERC compliance program to educate employees on the Ohio Corporate Separation Rules. As explained above, employees receive separate training on the Ohio Corporate Separation Rules. Further, the Companies believe there was some misunderstanding between FirstEnergy and SAGE on the topic of restrictions that come with the different FERC classifications. The Companies explained to the auditor that all FirstEnergy employees receive extensive training on FERC's “no conduit rule” and the different FERC classifications and pass that training on an annual basis.

5. Recommendation I-C-1

¹¹ Report at 36

¹² *Id.*

Recommendation I-C-1 is for the Companies to “[d]evelop an Ohio Corporate Separation Rules Compliance Program addendum to the FERC and NERC CIP Compliance Programs.”¹³ This recommendation is based on a misunderstanding of the Companies’ state regulatory compliance training. As stated previously, all employees are annually required to take training, separate and distinct from any FERC training, that includes the Ohio Corporate Separation Rules. As a result, this Recommendation is not applicable. In addition, if a potential compliance issue were identified, it would immediately be investigated, and any instance of non-compliance with the Ohio Corporate Separation Rules would be immediately addressed and corrected.

6. Recommendation I-C-2

Recommendation I-C-2 is for the Companies to “[t]ransfer all Service Company personnel who support FES CRES sales and customer service in Ohio to FES.”¹⁴ As stated above, the employees with sales responsibilities are FES employees. Only the Retail Operations group, which provides back office services, consists of FirstEnergy Service Company employees. This structure is fully compliant with Ohio’s Corporate Separation Rules and is consistent with other shared services employees such as Information Technology, Supply Chain and Human Resources. Indeed, since FirstEnergy Corp. no longer has any control over FES, it cannot simply transfer Service Company employees to FES. Therefore, this recommendation is moot.

These employees and their leadership did not violate any compliance regulation. They were trained and working as shared service staff and adhered to segregation of physical location and system and data access. As of the time of the audit, the Retail Operations groups was separated by two floors within the building and did not share any physical resources such as materials and system hardware or software. They also did not interact in any way, and their leadership did not

¹³ *Id.*

¹⁴ *Id.*

have joint business unit meetings or communications. As a result of these physical and functional separation measures, the use of Service Company personnel complies with the Ohio Corporate Separation Rules.

7. Recommendation I-C-3

Recommendation I-C-3 provides for the Companies, “[o]nce the plan for the exit of competitive commodity services is clear, [to] reexamine the FERC classification for all positions.”¹⁵ Any decisions to reclassify employees will be made consistent with and in compliance with FERC directives.

II. Transmission and Distribution System Access

1. Finding II-B-3

Finding II-B-3 states that “[t]he 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 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 With respect to this finding, the Report recommends that the Companies “[a]mend the Affiliate restrictions training to emphasize non-work situations.”¹⁷ As explained earlier, the auditor’s belief that the Companies rely on the FERC compliance program for training on the Ohio Corporate Separation Rules is mistaken. Further, the Report identifies no compliance problems resulting from non-work situations, and contains no evidence that non-work interactions among employees of different FERC classifications have resulted in violations of state or FERC rules.

¹⁵ Report at 37.

¹⁶ Report at 41

¹⁷ *Id.*

Thus, the Report provides no basis in fact for the extraordinary measure of trying to control employees' personal lives. Nor has the auditor identified any legal bases for the Companies to regulate employees' personal lives. Indeed, the Report is generally supportive of the Companies' physical and training controls, and therefore the Reports lacks sufficient evidence to support implementation of this recommendation. The training in place, as well as the potential for criminal and civil penalties, is more than sufficient to prevent wrongful dissemination of information.

2. Finding II-B-4

Finding II-B-4 states that “[w]hile there are strict physical and information system security measures, there are no security controls over FirstEnergy emails, land line phones, or cell phones.”¹⁸ To the contrary, the Companies have security controls within the Companies' email systems, including procedural controls surrounding corporate separation. For example, the Companies' email system identifies an internal email recipient's business unit. Also, the Companies' email system automatically includes a banner in emails sent by Transmission & Regulated Marketing personnel, warning that the email may contain information whose disclosure is restricted. Further, employees undergo annual training that addresses the appropriate actions regarding potentially sensitive information being exchanged via email.

3. Recommendation II-C-2

Recommendation II-C-2, which again extends outside state regulation and addresses FERC compliance, is for the Companies to “[d]evelop 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.”¹⁹ While not an audit program, the Companies have

¹⁸ *Id.*

¹⁹ Report at 63.

adequate controls in place to safeguard against the improper communication of restricted information by email or phone. These controls include every employee's duty to report the improper communication of restricted information, as well as the annual trainings which emphasize the potential for criminal and civil penalties arising from improper communication of restricted information. The Companies are willing to consider other options, such as increasing the Ohio Corporate Separation training to emphasize land line and cell phone calls. However, any audit program for emails, land line calls, or cell phone calls will require an IT solution to store data on emails and calls and then sample that data for content. Any such solution would be cost prohibitive and technically infeasible. Such a solution must be rejected, especially because the Report contains no evidence of improper communications of restricted information by email or phone.

4. Recommendation II-C-3

The Report notes that “the SAGE team observed multiple instances of the security procedures at non-NERC/CIP facilities not being followed. For confidentiality purposes, the security procedures and the observed violations are not delineated here.”²⁰ Recommendation II-C-3 states that the Companies should “[r]eemphasize following established security procedures in non-NERC/CIP facilities.”²¹

The Companies state that follow-up training has been completed, and a mitigation plan has been implemented to reduce the likelihood of residents not complying with the compliance protocols for access to their workspace. In addition, FirstEnergy Corporate Headquarters recently completed a physical security overhaul that restricts movement of personnel based on security clearance and business function by way of security badges and locked doors. The new security

²⁰ *Id.*

²¹ *Id.*

system prevents anyone from entering or leaving the Corporate Headquarters without proper security clearance. Further, under the system, every floor of the Corporate Headquarters is locked. An employee seeking access to any floor of the Corporate Headquarters must swipe a personal security badge showing the employee has proper security clearance for the business functions performed on that floor.

III. Anticompetitive Subsidies

Because this section of the Report found the Companies are in compliance and provided no recommendations, the Companies have no comments on this section of the Report.

IV. Comparable Access

1. Finding IV-B-5

Finding IV-B-5 notes that, “[t]he majority of CSR (customer service representatives) contract candidates do not become FirstEnergy Employees.” SAGE recommends that the Companies “evaluate the cost effectiveness of the contractor model used to bring in CSRs.”²² However, the Report never identifies any problem with using the contractor model for CSRs. The Companies have had no problems with using contractors as CRS, and therefore disagree with this finding and recommendation which is not justified by the substance of the Report.

2. Finding IV-B-6

Finding IV-B-6 provides, “[t]he 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.”²³ The Companies note that the Service Company Customer Service Group will no longer have an in-bound credit call contractor by year-end 2018. All work will be performed internally by FirstEnergy Customer Service Group employees. Therefore, this finding is now moot.

²² Report at 45

²³ *Id.*

V. Public Representations Disclosures

1. Finding V-B-2

Finding V-B-2 states, “FirstEnergy Solutions successful competitive retail services in the OH companies’ territories may be related to the FirstEnergy name.”²⁴ The Companies note that this observation is not supported by qualitative or quantitative data in the Report and is contradicted by FES’s filing for Chapter 11 Bankruptcy.

Finding V-B-2 goes on to recommend that FirstEnergy Corp. “[r]emove FirstEnergy from the name of FirstEnergy Solutions to eliminate affiliate bias.”²⁵ The Report contains no evidence of affiliate bias. Again, in the first quarter of 2018, FES filed for Chapter 11 bankruptcy. FirstEnergy Corp. has exited the competitive energy services business, and no longer exercises any control over FES, which is managed by independent officers and directors. Consequently, FirstEnergy Corp. cannot in any way encourage or influence FES to change its name. Moreover, forcing a CRES provider to change its name is likely unlawful, as it may infringe on a legally protected trademark, constitute a taking of private property without just compensation under the United States Constitution, and violate the rights of a CRES provider’s free speech under the United States Constitution. Since proposals to require a CRES provider to change its name suffer from a host of serious legal problems, it is no surprise that a proposal to do exactly that was previously presented to and soundly rejected by the Commission.²⁶ The same recommendation in the Report must be rejected here again as well.

2. Finding V-B-3

²⁴ Report at 97.

²⁵ *Id.*

²⁶ In the Matter of the Commission’s Review of its Rules for Competitive Retail Electric Service, Case No. 12-1924-EL-ORD, Finding & Order at p. 18 (12/18/13).

Finding V-B-3 provides, “[t]he link to the FES website from the FirstEnergy website provides an unfair advantage.”²⁷ It continues, “[t]he link from the FirstEnergy website to the separate FES website *could be interpreted* as an endorsement of FES CRES services by the Ohio Companies.”²⁸ The Companies respectfully note that the phrase “could be interpreted” is inherently speculative, and that the Report provides no data to support this speculation. To the contrary, the link to the FES website is not to FES’s home page, nor to any page where FES posts offers for CRES services. Rather, the link is to a page dedicated to information on FES’s Chapter 11 Bankruptcy. An introduction to a CRES provider through a web page detailing the CRES provider’s Chapter 11 Bankruptcy cannot be credibly characterized as an endorsement of the CRES provider’s services. Eventually, this issue will become moot as well. For these reasons, this finding should be rejected.

3. Recommendation V-C-1

Recommendation V-C-1 states that the Companies should “[r]emove FirstEnergy from the name of FirstEnergy Solutions to eliminate affiliate bias.”²⁹ Please refer to the Companies’ response to **Finding V-B-2** above.

4. Recommendation V-C-2

Recommendation V-C-2 states, “[r]emove the links between the FirstEnergy website and the FES website.”³⁰ This is to “remove the chance of miscommunicating that the Ohio Companies somehow endorse the FES CRES offerings in Ohio.”³¹ Please refer to the Companies’ response to **Finding V-B-3** above.

²⁷ Report at 98.

²⁸ *Id.* (emphasis added).

²⁹ Report at 98.

³⁰ Report at 99.

³¹ *Id.*

VI. Cost Allocation Manual

1. VI-A: Background

i. CAM Organizational Responsibilities

The Report notes that “[t]he Service Company Controllers Department is responsible for creating and maintaining FirstEnergy’s cost allocation methods and the [Cost Allocation Manual (“CAM”)]. The Service Company organizations that are involved with the CAM are shown in the following organizational chart.”³² The Companies note that the compilation of the Cost Allocation Manual is a collaboration of various departments. For example, the CAM includes input from other departments including Human Resources, and the Controllers’ Department does not oversee the Human Resources department. While called a “manual,” the CAM is dynamic with its various parts.

ii. Cost Collection

2. Finding VI-B-4 & Recommendation VI-C-1

Finding V-B-4 notes that “[o]ne of the CAM’s 18 allocation methods uses an arbitrary factor.”³³ Specifically, “FirstEnergy is first assigned five percent of the indirect costs that are being allocated before applying other, measurable factors[.]”³⁴ The Report states that “[t]he five percent assigned to FirstEnergy is arbitrary and not based on any measurable factor.”³⁵

Further, Recommendation VI-C-1 provides that “[t]he definition of this allocation method in the CAM does not include any definable measurement for this five percent allocation. This allocation should be evaluated and reconfigured so that all allocation of costs using this allocation

³² Report at 111.

³³ Report at 118.

³⁴ *Id.*

³⁵ *Id.*

method is based on measurable and appropriate criteria.”³⁶ In response, the Companies note that the current cost allocations, including this 5% allocation, are reflected in FirstEnergy Corp.’s published financial results, which are audited by an external auditor. Further, the allocation of indirect costs to FirstEnergy Corp. is the subject of commitments in other regulatory jurisdictions. For instance, the assignment of a 5% level of indirect costs to FirstEnergy Corp. (in addition to Service Company costs directly charged to FirstEnergy Corp.) is consistent with the requirements of a settlement reviewed and approved by the New Jersey Board of Public Utilities in 2005. Therefore, while a review of this allocation factor and potential reallocation of the Companies’ share of these costs may be reasonable, any comprehensive reconfiguration of the 5% allocation to FirstEnergy Corp. would be impractical, since such changes are subject to approvals and other commitments across the jurisdictions in which FirstEnergy Corp.’s CAM applies.

3. Finding VI-B-9

Finding VI-B-9 states that “FirstEnergy’s VP, Compliance and Regulated Services, is the designated contact for all matters related to affiliate transactions with the PUCO.” SAGE appears to have misidentified the contact and the Companies addressed this in their annual CAM update to Staff in August 2018.

4. Finding VI-B-12

Finding V-B-12 notes that “[t]he CAM does not include all of the elements required by the Ohio Administrative Code.”³⁷ The Report then lists certain items from Ohio Administrative Code paragraph 4901:1-37-08(D)(1), (4), (5), (6), (7), (8), (9), and further notes that “[a]lthough these elements may be available in some other format, they were not included in the CAM that was

³⁶ Report at 121.

³⁷ Report at 120.

provided to the auditors.”³⁸ This finding is based on a misunderstanding of the Companies’ CAM, which includes all elements required by the Ohio Administrative Code. The Companies wish to clarify that the Companies interpreted the referenced requests as being directed to the Controllers’ Department. Therefore, the accounting related CAM information was provided in response. As noted above, the CAM requirements are broader than just accounting information and contain components that can change often. The Companies note, as the Report suggests, that all components of the CAM can be made available, in addition to the accounting information. Because the CAM includes all elements required by the Ohio Administrative Code, this finding is incorrect and should be rejected.

CONCLUSION

The Companies respectfully urge the Commission to consider these comments as the Commission reviews SAGE’s Report.

Respectfully submitted,

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*On behalf of Ohio Edison Company,
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The Cleveland Electric Illuminating
Company*

³⁸ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company were filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 31st day of December 2018. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ **Scott J. Casto**
Scott J. Casto

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Summary: Comments electronically filed by Mr. Scott J Casto on behalf of The Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company