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 Compliance with R.C. 4928.17 and Ohio Admin. Code Chapter 4902:1:37.	)))))	Case No. 17-974-EL-UNC

REPLY COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

I. INTRODUCTION

Notwithstanding the comments filed by Northeast Ohio Public Energy Council ("NOPEC"), Retail Energy Supply Association ("RESA"), the Office of Consumers' Counsel ("OCC") and IGS Energy ("IGS"), the Commission should reject Recommendation V.C.1. found in the SAGE Audit Report that "FirstEnergy" be removed from the name FirstEnergy Solutions Corp. ("FES"). First, because FES's trade name is not an issue in—nor is FES even a party to—this case but, instead, FES's continuing operations are before a federal bankruptcy court, the Commission cannot and should not compel FES to discontinue using its name in this proceeding. Further, Recommendation V.C.1. directly contradicts a previous ruling on this issue by the Commission, as well as the Commission's repeated approval and extension of FES's Competitive Retail Electric Service ("CRES") certification applications since the year 2000. If the name FES had been found to be "unfair, misleading, and deceptive" then the Commission would have done neither of these things. Finally, there is no legal or factual support that would provide a basis to detour from the Commission's holding addressing this exact issue. Accordingly, the Commission should not adopt Recommendation V.C.1.

II. REPLY COMMENTS

A. Because FES is not a party to this case, nor is its branding at issue, the Commission has no authority to force it to change its name.

As an initial matter, arguments made by NOPEC, RESA, OCC and IGS that FES be forced to change its trade name must be denied because that FES's name is not a proper issue in this proceeding. As outlined in the Commission's May 17, 2017 Entry, this series of cases involves the distribution utilities and their corporate separation policies, not FES.[1] Moreover, FES is not a party to this proceeding, has not been given formal notice that this proceeding could impact its right to use the "FirstEnergy" name, and no party has given notice to the bankruptcy court of any possible regulatory taking of the FES name.

Preventing FES from utilizing the "FirstEnergy" name will infringe upon FES's property rights in violation of the automatic stay under section 362 of title 11 of United States Code (the "Bankruptcy Code"). As the Commission is aware, FES is a debtor under chapter 11 of the Bankruptcy Code. The commencement of the chapter 11 cases operates as a stay of all actions to, among other things, "exercise control over property of the [debtor's] estate."[2] FES has a property interest in its rights to use the "FirstEnergy" name by virtue of an implied license granted by its parent company, FirstEnergy Corp., through FES's continued, authorized use of the name in connection with its retail business.[3] Accordingly, FES's right to use of the "FirstEnergy" name is part of its bankruptcy estate and is protected by the automatic stay.[4] Denial of FES's continued

[1] May 17, 2017 Entry, ¶ 2.
[2] 11 U.S.C. § 362(a)(3).
[3] *See Menendez v. Holt*, 128 U.S. 514, 524, (1888) (recognizing the establishment of an inferred license of a trademark where the owner has knowledge of use of the trademark and remains silent); *Doeblers' Pennsylvania Hybrids, Inc. v. Doebler*, 442 F.3d 812, 824 (3d Cir. 2006) ("Although it appears that there is no express written license agreement between the parties, a trademark license can also be implied…."); *see also Big Cola Corp. v. World Bottling Co*., 134 F.2d 718, 721 (6th Cir. 1943)(recognizing implied contracts with respect to trademarks).
[4] *See* 11 U.S.C. § 541(a)(1) (stating that the bankruptcy estate is comprised of "all legal and equitable interests in property as of the commencement of the case").

use of this property right cannot be accomplished without the Commission seeking relief from the automatic stay or being subject to an exemption from such stay (which FES would strenuously contest).

Once FES emerges from bankruptcy, it will no longer be affiliated with the FirstEnergy distribution utilities. And, although the emergence of FES from bankruptcy at some point in time could result in the transition to a different trade name, this issue likely will be addressed in either the Plan of Reorganization or in a subsequent proceeding that has yet to be submitted to the bankruptcy court. In the meantime, the inability of FES to use its name to conduct operations could have very adverse consequences on the bankrupt estate and could inhibit FES's ability to reorganize under federal law. Further, if FES were forced to change its name while in bankruptcy, this would likely create unnecessary customer confusion if the name is later changed again as part of emergence from bankruptcy. The better course is to leave this issue for resolution in the normal course of the bankruptcy court proceedings.

Accordingly, not only does the Commission lack authority to compel FES to change its trade name in this proceeding, but such an order is unnecessary, potentially anti-competitive and would create unnecessary customer confusion.

B. Because the Commission has previously found that affiliates are permitted to use trade names that are related to their parent companies, the unsupported argument that FES's branding violates the corporate separation rules is without merit.

Even if FES's trade name were at issue here—which it is not—the unsupported argument that FES be forced to cease use of its trade name still fails. NOPEC, RESA, OCC and IGS completely disregard that the Commission has already analyzed this issue, rejected the arguments they now assert, and held that affiliates are permitted to use names similar or related to their parent

companies.[5] Any reversal of this position would have broad implications for many companies operating in Ohio.

In response to the Commission's request for comment on proposed amendments to the CRES rules, Eagle Energy suggested that O.A.C. 4901:1-21-05(C)(8)(g) be amended to include language prohibiting affiliates from adopting a similar name to its EDU to avoid customer confusion about their actual supplier.[6] FES, as well as AEP Ohio, Direct Energy, and others, filed reply comments raising a plethora of legal issues. First, FES argued that forcing a CRES provider to change a current name constitutes a taking of private property without just compensation under the Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment.[7] Because FES—and other CRES providers—have a significant property interest in preserving its ability to use its trade name and the associated goodwill it has developed in the competitive retail market with customers, vendors, and the public, adopting a rule preventing affiliates from choosing their trade names arguably is unconstitutional.[8]

Likewise, FES also argued that forcing FES to change its current name violates its free speech rights under the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment.[9] Trade names have long been recognized as constitutionally protected commercial speech because they serve to identify a business entity and convey important information about its type, price, and quality of service.[10] AEP Ohio took a similar approach and

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[5] *See In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code*, Case No. 12-1924-EL-ORD, Finding and Order (Dec. 18, 2013).
[6] Case No. 12-1924-EL-ORD, Eagle Energy Initial Comments at 4, 7.
[7] Case No. 12-1924-EL-ORD, FES Reply Comments at 5.
[8] *Id. See Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F.Supp. 1339, 1345 (E.D.N.Y.1994) ("Trade names and service marks are property interests that may be protected under both state and federal law.).
[9] Case No. 12-1924-EL-ORD, FES Reply Comments at 5.
[10] *See Sambo's Restaurants, Inc. v. City of Ann Arbor,* 663 F.2d 686 (6th Cir.1981) (finding that a trade name is a valuable asset which conveys information to customers. As such, even an obviously racist trade name may not be prohibited by a municipality in light of Plaintiff's first amendment rights to the trade name).

argued that "[i]nfringement on a company's right to choose its own name is not an area appropriate for Commission review."[11]

Finally, Direct Energy argued that, as a threshold matter, the Commission must first determine whether use of a similar name was misleading to customers.[12] If the Commission found that use of a similar name was misleading, then no entity—including an affiliate—should be permitted to use the name.[13] If, however, the Commission determined that use of a similar name was not misleading, then any single entity with licensing rights should be free to use the similar name.[14]

After taking the above arguments into consideration, the Commission declined to adopt Eagle Energy's proposed language.[15] The Commission reasoned that, "absent other circumstances indicating that the use of the name and/or logo is unfair, misleading, or deceptive," the Commission did "not believe that an unaffiliated CRES supplier should necessarily be prohibited from using the incumbent utility's name and/or logo."[16] Thus, the Commission made clear that absent any proof of deception, use of a similar name to its parent company by an affiliate is lawful.

NOPEC, RESA, OCC and IGS have offered nothing to differentiate this well-reasoned Commission decision. They also have failed to acknowledge Ohio's extensive history of competitive providers using names similar to regulated utilities in both the gas and electric fields, such as AEP Energy Inc.,[17] Duke Energy Retail Sales,[18] Dominion Retail Inc.,[19] and Vectren

[11] Case No. 12-1924-EL-ORD, AEP Ohio Reply Comments at 2.
[12] Case No. 12-1924-EL-ORD, Direct Energy Reply Comments at 5
[13] Case No. 12-1924-EL-ORD, Direct Energy Reply Comments at 5.
[14] *Id*.
[15] Case No. 12-1924-EL-ORD, Finding and Order at 18.
[16] *Id*.
[17] Case No. 10-0384-EL-CRS; 12-1491-GA-CRS.
[18] Case No. 04-1323-EL-CRS.
[19] Case No. 00-1781-EL-CRS; 02-1757-GA-CRS.

Retail, LLC.[20] In fact, OCC has claimed that use of a similar name is misleading and deceptive since the year 2000, and specifically made that argument regarding the name FES.[21] If it were truly misleading to use the same name as a regulated utility, the Commission would not have repeatedly approved these names over the last eighteen years. While SAGE may not have been familiar with the extensive Ohio history on this issue, the failure of NOPEC, RESA, OCC and IGS to even acknowledge it is revealing.

C. There is no evidence that FES's use of the "FirstEnergy" name is unfair, misleading, or deceptive.

The final nail in the coffin here is the failure to provide any legal or factual support to bolster the accusation that FES's branding "constitutes an unfair, misleading, and deceptive marketing practice."[22] Indeed, neither the SAGE Audit Report nor any party presents any new facts or "other circumstances" now that were not present when the Commission addressed this issue previously that would warrant a departure from the Commission's previous holding that use of a similar name by an affiliate is reasonable and lawful.[23] Accordingly, because FES's use of the "FirstEnergy" name is reasonable and lawful, Recommendation V.C.1. should be rejected.

[20] Case No 11-1078-EL-CRS.
[21] OCC Comments, pp. 3-4 (citing *Exelon et al. v. FirstEnergy Service Corp*., Case No. 00-1862-EL-CSS, OCC Motion to Intervene and Memorandum in Support at 3 (Oct. 30, 2000); *In the Matter of the Application of FirstEnergy Services Corp. for Certification for Retail Generation Providers*, Case No. 00-1742-EL-CRS, OCC Motion to Intervene (Oct. 30, 2000).)
[22] *See*, *e.g.*, NOPEC Initial Comments at 2.
[23] *See* Case No. 12-1924-EL-ORD, Finding and Order at 18.

III. CONCLUSION

For the foregoing reasons, the request of NOPEC, RESA, OCC and IGS that the Commission force FES to change its trade name must be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 7th day of January 2019. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Summary: Reply Comments electronically filed by Mr. Trevor Alexander on behalf of FirstEnergy Solutions Corp.