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

JOINT REPLY COMMENTS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION AND IGS ENERGY

The Retail Energy Supply Association (RESA) and IGS Energy (IGS) offer the following reply comments to initial comments filed on December 31, 2018.[1]

I. INTRODUCTION

Several entities or organizations have filed comments echoing RESA's concerns about the lack of separation among FirstEnergy affiliates. Like RESA, Office of Ohio Consumers' Counsel (OCC), Northeast Ohio Public Energy Council (NOPEC) and IGS all support the auditors' recommendations. When a cross-section of both customers and competitors raise the same concerns, the Commission should not only listen, but take action.

One group of stakeholders is notably absent from the discussion. The Ohio Companies[2] have filed comments, but their affiliates have not. The comments, however, do not pertain to issues directly involving the Ohio Companies. For example, whether *FirstEnergy Solutions* should be permitted to continue using the "FirstEnergy" name is of no legitimate concern to the *Ohio Companies*. Yet the Ohio Companies—not FES, not FirstEnergy Service Company, and

[1] The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] As in the Sage Report, "Ohio Companies" means Ohio Edison Company, Toledo Edison Company and Cleveland Electric Illuminating Company, collectively.

not FirstEnergy Corp.—are the entities defending FES's use of the parent company's name. The Ohio Companies' comments corroborate the point made in RESA's initial comments—that no FirstEnergy affiliate functions independently of any other; all are the alter ego of the Service Company and FirstEnergy Corp. Indeed, Service Company counsel prepared and filed FirstEnergy's comments on the Ohio Companies' behalf.

The Commission should not ignore the recommendations of an independent auditor. Nor should the Commission limit its actions to those recommended by the auditor. The final order in this proceeding should find: (a) that FES's use of the FirstEnergy name and logo confers an unlawful preference or advantage; (b) that the Ohio Companies are offering Smart Mart products and services in violation of law; and (c) that reasonable grounds exist to investigate whether the Ohio Companies have properly charged FES all appropriate supplier fees.

II. REPLY COMMENTS

The Ohio Companies address recommendations that do not pertain to them, but to their affiliates. RESA and IGS will therefore refer to their filing as "FirstEnergy Comments."

A. The FirstEnergy Comments prove that the Ohio Companies do not function independently of their affiliates.

The auditors' recommendations largely concern FirstEnergy's competitive or unregulated activities. As the Ohio Companies themselves note, "FirstEnergy Corp.'s former competitive energy services business was the focal point of several of SAGE's recommendations, findings and comments."[3] The fact that the *Ohio Companies* address issues related to the competitive energy services business of their affiliates explains why their affiliate's bankruptcy does not render any corporate separation issues "moot."[4]

[3] FirstEnergy Comments at 1.

[4] *Id*. at 2, 4, 7, 11, 13 (characterizing issues raised as "moot" or soon to become moot).

At the risk of stating the obvious, RESA and IGS would point out that the subject matter of this proceeding is corporate separation. The Sage Report addresses issues that involve separate corporations. The entire point of the audit was to determine whether these separate corporations "function independently of each other."[5] Many of the recommendations pertain to issues that the Ohio Companies are not competent to address or have no legitimate interest in addressing. For example, whether FirstEnergy Corp. or the Service Company should permit FES to continue using the "FirstEnergy" name is not the Ohio Companies' concern. The Commission's invitation for any "interested person" to file comments gave the Service Company and FES the opportunity to address this issue.

But neither the Service Company nor FES addressed *any* issues directed specifically to them. Neither addressed the FERC designations attributed to Service Company or FES personnel. Neither addressed the "highly inappropriate" reporting structure at FES that lends itself to sharing competitive and noncompetitive information.[6] The Service Company did not address the training it allegedly provides to it employees, or the rationale for using contracted CSRs instead of direct hires. None of these issues should be of any concern to regulated utilities required to "function independently" from their affiliates. Yet it is the Ohio Companies who have addressed all of these issues, not the affiliates implicated.

The Sage Report notes how putting the Service Company in charge of both competitive and noncompetitive businesses "makes separation of regulated and competitive information highly challenging."[7] FirstEnergy's Comments confirm that the Service Company holds little regard for the separation of competitive and noncompetitive information. There is no reason for

[5] O.A.C. 4901:1-37-04(A)(1) ("Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other.")

[6] Sage Report at 34.

[7] *Id*.

the Ohio Companies to know whether or if the Service Company will "cease[] providing back office support to FES."[8] The Ohio Companies should have no basis to opine whether "employees who work for [the] Service Company must be classified as Shared Services."[9] Whether FES's sales and reporting structure "is fully compliant with Ohio's Corporate Separation Rules" is not something the Ohio Companies would know if they were observing their own code of conduct.[10] The FirstEnergy Comments reflect the *Service Company's* collective knowledge and demonstrate that this knowledge is freely (and publicly) shared with affiliates.

FirstEnergy's Comments prove the point RESA raised in its initial comments: that the utilities serve the Service Company, not the other way around. The Service Company prepared and filed comments in which the Ohio Companies are essentially serving as the spokesperson for their affiliates. When FirstEnergy claims the Sage Report "contains no evidence of affiliate bias," the Commission need not look at anything other than FirstEnergy's own comments to recognize that this is untrue.

B. The Commission has the authority to find that co-branding under the "FirstEnergy" name confers an unfair advantage to FES.

FirstEnergy's comments do not acknowledge the separate interests of the Ohio Companies and their affiliates because FirstEnergy itself does not consider these interests to be separate. In the 20-plus years since FirstEnergy came into existence, it has spent millions advertising the common ownership and control of all "FirstEnergy" subsidiaries. The public has been conditioned to associate any service received by any affiliate as a "FirstEnergy" service. This is why the Cleveland Browns play in "FirstEnergy Stadium," not "Ohio Edison Stadium" or "FirstEnergy Solutions Stadium."

[8] FirstEnergy Comments at 4.

[9] *Id*. at 6.

[10] *Id*. at 7.

As the auditors note, "it is impossible" to not make a connection between the Companies and FES due to the common use of the "FirstEnergy" name and logo.[11] The fact that the *Ohio Companies* are defending FES's use of the FirstEnergy name says more than anything RESA or IGS could say about FirstEnergy's motives.

FirstEnergy claims that its corporate branding strategy could not have given FES an unfair advantage because FES went bankrupt.[12] FES landed in bankruptcy *despite* its unfair competitive advantage in the CRES market. FES's retail supply business was and is profitable. FES owns subsidiaries in the generation market, and it was the failure of these subsidiaries that ultimately brought FES down.

Next, FirstEnergy suggests that it cannot change FES's name, even if it wanted to, because FirstEnergy Corp. "no longer exercises any control over FES" and "cannot in any way encourage or influence FES to change its name."[13] This is simply not true. FirstEnergy Corp. remains the sole shareholder of FES and continues to report information about FES to the SEC and shareholders—a fact easily confirmed through FirstEnergy's website. Moreover, it is absurd to think that FirstEnergy would allow an entity it "cannot in any way encourage or influence" to use the "FirstEnergy" registered mark without permission.

Lastly, FirstEnergy notes that "forcing a CRES provider to change its name is likely unlawful." The issue is not whether the Commission can *literally* require a CRES provider to organize under a name chosen by the Commission or change a name the Commission does not like. That is clearly not what the Sage Report is suggesting. The report is recommending to *FirstEnergy* that *FirstEnergy* change FES's name. If FirstEnergy refuses to do so, it is subject to

[11] Sage Report at 98.

[12] FirstEnergy Comments at 12.

[13] *Id*.

enforcement action. FirstEnergy retains the right to market and brand its affiliates however it wishes, but it is also subject to the consequences of these choices.

The use of a trade name is a form of commercial speech under the First Amendment, but this right is not absolute. *See Friedman v. Rogers*, 440 U.S. 1, 12–13 (1979) (affirming state regulations restricting the use of misleading trade names). States may regulate the use of trade names because "there is no value to consumers or society for misleading or deceptive commercial speech." *AEP Texas Commercial & Indus. Retail Ltd. P'ship v. Pub. Util. Comm'n of Texas*, 436 S.W.3d 890, 923–24 (Tex. App. 2014) (affirming PUC decision that rejected AEP's application to provide competitive services through "AEP Energy.") In *AEP Texas*, the Texas PUC and affirming court based their decision on the very same points raised in the Sage Report.

The Commission is obviously not bound by Texas law, but Ohio law supports the same outcome. Neither Ohio nor Texas have a statute or administrative rule requiring an outright ban on any and all co-branding. The respective statutes and rules give the regulating authority broad discretion to decide, on a case-by-case basis, the actions necessary to prevent "unfair competitive advantage" or "abuse of market power." The key word here is "prevent." The Commission does not need "qualitative or quantitative data" of *actual* affiliate bias to *prevent* affiliate bias before it occurs.[14] *See AEP Texas*, 436 S.W.3d at 910 ("We agree with appellees that the Commission was reasonable in construing Rule 25.107(e)(1) to contemplate prospective evaluation of whether allowing an REP to use a particular business name would likely or potentially lead to Code of Conduct violations, as opposed to requiring proof that the REP has engaged or plans to engage in some specific communication that would violate the Code.").

[14] FirstEnergy Comments at 12.

The Commission's decision to not incorporate a ban on co-branding in its administrative rules does not prevent the Commission from acting here.[15] The Commission may not only remedy past code of conduct violations; it may act to prevent future violations.[16] If FirstEnergy's present code of conduct is deemed insufficient to accomplish the goals of corporate separation, the Commission may order that it be changed.[17] And in considering whether FirstEnergy should be allowed to continue co-marketing and co-branding competitive affiliates, the Commission should also consider FirstEnergy's conduct *after* the Commission adopted its current rules. FirstEnergy has repeatedly bent the rules governing affiliate relations to their breaking point.

In an audit of the Ohio Companies' renewable energy rider, for example, the record showed that the Ohio Companies issued an RFP for REC purchases; that FES bid on the RFP; and that the Ohio Companies' independent RFP manager rejected FES's bid.[18] The Ohio Companies forged ahead anyway and entered a bilateral agreement to purchase RECs from FES.[19] OCC asked the Commission to investigate compliance with the code of conduct but the Commission declined, finding "no evidence in the record in this proceeding to support further investigation at this time."[20] Neither the Ohio Companies nor FES suffered any consequences for the $43 million in imprudent REC purchases. *See In re Ohio Edison Co*., 153 Ohio St. 3d. 289, 2018-Ohio-229 (reversing Commission order for refunds).

[15] Case No. 12-1924-EL-ORD, Dec. 18, 2013 Finding and Order at 18.

[16] *See* R.C. 4928.18(A).

[17] *See* R.C. 4928.17(D).

[18] Case No. 11-5201-EL-RDR, Aug. 7, 2013 Opinion and Order at 25-28.

[19] *Id*. at 28.

[20] *Id*. at 29.

A pending complaint by Direct Energy against Ohio Edison and CEI also raises serious questions about affiliate bias.[21] Between 2013 and 2015, the utilities experienced a "computer error" that resulted in FES being charged for $25 million in wholesale power costs that should have been paid by other suppliers. The utilities made a deal to cover FES's losses by going after the suppliers who received "windfalls" and remitting any litigation proceeds to FES. Both legally and practically, the utilities assumed the role of a debt collector on FES's behalf—an action that not only violates R.C. 4928.17, but the utilities' Supplier Tariffs. The case was tried to the Commission in May 2018 and awaits decision. RESA's complaint regarding Smart Mart products and services also raises serious issues about affiliate bias.[22]

RESA and IGS are not asking the Commission to use this proceeding as a forum to change its rules or announce a statewide ban on all co-marketing and co-branding by any utility and its affiliates. The Sage Report and FirstEnergy's history demonstrate a need to end this practice at FirstEnergy. The Ohio Companies have no grounds to object to whether a competitive affiliate may market under the same parent company name.

C. The Commission should order the relief requested in RESA's initial comments.

RESA's initial comments asked the Commission to order an audit of the supplier fees payable and actually paid by FES under the Ohio Companies' Supplier Tariff. No party has filed comments in any way inconsistent with this request. The Ohio Companies had both the motive and opportunity to discount or waive the supplier charges assessed to its affiliate. The

[21] *Direct Energy Business, LLC v. Ohio Edison Co. and The Cleveland Electric Illuminating Co*., Case No. 17-791-EL-CSS (Complaint filed March 20, 2017). Almost immediately after Direct filed this complaint, Ohio Edison and CEI sued Direct in federal court, arguing that an assignment of rights from FES gave them standing to sue Direct under an "unjust enrichment" theory. The district court granted Direct's motion to dismiss the case. The utilities promptly turned around and filed a complaint with the Commission, advancing essentially the same theory. *See* Case No. 17-1967-EL-CSS (Complaint filed Sept. 11, 2017). The Commission complaints were consolidated for hearing.

[22] *See* Complaint, Case No.18-0736-EL-CSS (filed April 25, 2018).

Commission should not entertain FirstEnergy's request to continue in a business-as-usual fashion without confirming whether it has treated its affiliates the same as non-affiliates.

Nor are any comments inconsistent with RESA's request to order a moratorium on any further sales of Smart Mart products and services. The same cabal that supports FES is now developing nonelectric products and services that are not being sold through FES, but through the Ohio Companies. One can only assume that the Service Company has arranged the Smart Mart program the way that it has to position the Ohio Companies for success in offering products and services that may become available through PowerForward. The Commission has analogized the PowerForward marketplace to a "platform" similar to the iPhone, where Apple focuses on the operating system and third-party providers focus on apps. If FirstEnergy continues in its pursuit to control products and services available not only behind the meter but in front of it, competitive suppliers will be relegated to the sidelines, and FirstEnergy consumers will be treated to a user experience that functions more like a BlackBerry than an iPhone. (Those old enough to remember will recall that RIM controlled both the hardware and software of its devices).

The Service Company cannot offer Smart Mart products and services directly because it is not certified to offer nonelectric products and services. The Ohio Companies cannot offer these products and services because they are non-competitive service offerings. The tariff allowing the Ohio Companies to provide jobbing and contracting services does not extend to Smart Mart products and services. While RESA and IGS obviously have an interest in ending this program, so does the Commission—if the Commission is truly interested in transforming FirstEnergy's distribution grid to an open and transparent platform.

III. CONCLUSION

Customers, competitors, and an independent auditing group are all telling the Commission the same thing: FirstEnergy's corporate separation practices are in desperate need of reform. FirstEnergy's decision to use its regulated subsidiaries to advocate the interests of unregulated affiliates merely highlights the need for prompt action.

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Respectfully submitted,

/s/ *Rebekah J. Glover*
Mark A. Whitt (0067996)
Rebekah J. Glover (0088798)
WHITT STURTEVANT LLP
88 E. Broad St., Suite 1590
Columbus, Ohio 43215
Telephone: (614) 224-3946
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
glover@whitt-sturtevant.com

Attorneys for Retail Energy Supply Association

/s/ *Joseph Oliker*
Joseph Oliker (0086088)
Email: joliker@igsenergy.com
Michael Nugent (0090408)
Email: mnugent@igsenergy.com
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
Telephone: (614) 659-5000
Facsimile: (614) 659-5073

Attorneys for IGS Energy

(All counsel consent to service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail this 7th day of January, 2019, to the following:

scasto@firstenergycorp.com
dakutik@jonesday.com
radoringo@jonesday.com
maureen.willis@occ.ohio.gov
joliker@igsenergy.com
mnugent@igsenergy.com
gkrassen@bricker.com
dstinson@bricker.com
thomas.lindgren@ohioattorneygeneral.gov

/s/ Rebekah J. Glover
Rebekah J. Glover

Summary: Text Joint Reply Comments electronically filed by Ms. Rebekah J. Glover on behalf of Retail Energy Supply Association and IGS Energy