

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of The Ohio Edison     )  
Company, The Cleveland Electric Illuminating     ) Case No. 17-974-EL-UNC  
Company, and The Toledo Edison Company's     )  
Compliance with R.C. 4928.17 and the Ohio     )  
Adm. Code Chapter 4901:1-37.     )

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**SUPPLEMENTAL COMMENTS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

On December 31, 2018, parties including the Office of the Ohio Consumers' ("OCC") filed comments<sup>1</sup> for protecting consumers and for fostering for Ohioans a competitive and fair electric market. At that time, FirstEnergy Solutions (FES) was selling electric utility service using the corporate name that the FirstEnergy monopoly distribution utilities use. And FirstEnergy Solutions was receiving services from FirstEnergy Service Corp. with some key service employees performing both regulated and non-regulated services. The PUCO hired auditor, SAGE Management Consultants, Inc. ("Auditor") to review FirstEnergy's corporate separation plan. .<sup>2</sup> The Auditor made recommendations that FirstEnergy Solutions be prohibited from using the "FirstEnergy" name in its marketing business and recommended that FES no longer receive services from FirstEnergy Service Corp.

Since then, FirstEnergy Solutions came out of bankruptcy as "Energy Harbor Corp." and is no longer an affiliate of FirstEnergy Corp.<sup>3</sup> Additionally, Suvon, LLC ("FirstEnergy Advisors,") an affiliate of FirstEnergy Corp., applied for authority to become a power broker and aggregator in Ohio.<sup>4</sup>

Based on the corporate separation issues that the Auditor had raised, OCC and others recommended FirstEnergy Advisors' power broker application be denied. The PUCO did not

agree. When the PUCO authorized FirstEnergy Advisors' application, it deferred ruling on the corporate separation issues raised by OCC and others that pertained to the use of the FirstEnergy trade name and the sharing of executives.<sup>5</sup> Instead the PUCO found that those issues are best raised in other proceedings, specifically pointing to this proceeding addressing FirstEnergy utilities' corporate separation plan. OCC and other parties have pursued applications for rehearing on the PUCO's finding, and those applications are pending.<sup>6</sup>

The PUCO has, by Entry, permitted the filing of supplemental comments and supplemental reply comments regarding the audit report in light of FirstEnergy Solutions emergence from bankruptcy and the PUCO's ruling in FirstEnergy Advisor's certification case.<sup>7</sup> Under this process, OCC offers its suggestions for consumer protection.

## **II. CONSUMER PROTECTION IN COMPETITIVE RETAIL GENERATION SERVICES AND PUBLIC REPRESENTATIONS AND DISCLOSURE**

The PUCO should be concerned about the harmful effect on consumers and competition from potential cross subsidization between regulated distribution utilities and their unregulated affiliates providing retail electric service. Cross subsidization may artificially increase the cost of utility service from the regulated utility (passed onto consumers) as costs incurred for the benefit of the affiliate are shifted to the regulated utility. Additionally, cross subsidization may increase costs in unregulated markets by displacing innovative, lower-cost suppliers and entrants with a higher-cost affiliate of the local regulated distribution utility. There are two cross subsidization issues of concern for customers that are raised in this proceeding: use of the FirstEnergy's name by its affiliate and the pervasive sharing of executives between the utility and its affiliate.

**A. It is reasonable and lawful to protect Ohio consumers by barring FirstEnergy Advisors from using the “FirstEnergy” name when the FirstEnergy Utilities use the same name for their monopoly distribution service**

The Auditor has properly and amply explained that the use of the “FirstEnergy” name could create affiliate bias and such a bias is not in the best interests of Ohioans.<sup>8</sup> And while the Auditor’s recommendation was made in the context of FirstEnergy Solutions’ use of the regulated utility name, its findings are equally applicable to FirstEnergy Advisors’ use of the regulated utility name.

Use of a name so closely aligned with the FirstEnergy Utilities is bound to cause customer confusion and is akin to deceptive advertising.<sup>9</sup> Use of the name, coupled with the FirstEnergy logo, which is prominently displayed on FirstEnergy Advisors’ website, adds to the harm. Harm to consumers and competition could occur if customers rely on the reputation of the FirstEnergy utilities or FirstEnergy Corp. and believe that FirstEnergy’s Advisors’ service is financially backed up by FirstEnergy when it is not.<sup>10</sup>

The risks to customers go beyond customer confusion and can extend to cross subsidization from FirstEnergy Advisors’ use of the FirstEnergy name. Here the reputation of FirstEnergy is embodied in its name. FirstEnergy can improve its reputation by incurring costs that may find their way into FirstEnergy’s rates. Additionally, FirstEnergy Advisors enhances its own reputation among consumers by using the name or logo of FirstEnergy, even if FirstEnergy’s reputation does not apply to it. In these circumstances, FirstEnergy utilities have a heightened incentive to overinvest in reputation building, with regulated consumers at risk of paying for that reputation building and its affiliates, such as FirstEnergy Advisors., receiving the benefits.

Additionally, competition can be harmed because FirstEnergy Advisors has an advantage that cannot be met by competitors – that advantage is the use of the name and highly recognizable FirstEnergy logo. This can create higher costs for the industry and higher prices for consumers. And to the detriment of consumers, greater market concentration and less competition is also a

consequence. Potential entrants may be discouraged from competing in the market that they otherwise would have participated in minus the cross-subsidization. Harm to retail electric competitive market harms customers because they rely on the market for lower prices and greater innovation.

The Auditor recommended that if FES continues to be a CRES provider in Ohio, it should have a different name that does not include “FirstEnergy” or any other name that implies a connection to the Ohio companies. Audit Report at 98-99. That recommendation should be applied to FirstEnergy Advisors. At least one state, Illinois, precludes an affiliated retail electric supplier from using the name or logo of the public utility.<sup>11</sup> Ohio should follow the lead of its sister state.

Precluding use of the utility name in FirstEnergy Advisors’ marketing would be most protective of customers who could be easily misled. Use of even a properly worded disclaimer, may not be sufficient to protect consumers who will be confused by the affiliate’s use of its parent’s name.

In a study conducted for the Nevada Public Utilities Commission, entitled “Energy Company Advertising” it was concluded that the addition of a disclaimer does not appreciably reduce customer confusion when compared to requiring the use of a dissimilar name or logo.<sup>12</sup> (Attachment A). Other studies addressing the general topic of disclaimers come to the same conclusion.

In a survey conducted of disclaimers and their effects, researchers found that disclaimers reduced confusion for only a negligible portion of survey respondents.<sup>13</sup> The survey by Jacoby and Szybillo additionally found that disclaimers relying on brief negator words such as ‘no’ and ‘not’ are not likely to be effective.<sup>14</sup> In another survey, “Evidence on the Effects of Mandatory Disclaimers in Advertising,” the authors (Green and Armstrong) found that mandatory disclaimers

are unlikely to influence consumers in the way that drafters intend but rather are likely to influence them in unexpected and detrimental ways.<sup>15</sup> In that study, Green and Armstrong examined 18 other studies on mandatory disclaimers and found the mandatory disclaimers caused confusion among consumers. Green and Armstrong also concluded that disclaimers led customers to make poor decisions.<sup>16</sup>

We agree with the conclusions reached in these studies that disclaimers are not effective and confuse customers, leading to potentially bad and unintended choices. The PUCO should follow the Auditor's recommendation that an unregulated affiliate of FirstEnergy should not use the FirstEnergy name and logo to market its services to Ohioans.

**B. If the PUCO allows FirstEnergy Advisors to use the FirstEnergy name, it should require FirstEnergy Advisors to pay a royalty to FirstEnergy customers**

If the PUCO allows FirstEnergy Advisors to use the FirstEnergy name (it should not), then FES should be required to pay, on a continuing basis, as long as the name is used, a substantial royalty to the FirstEnergy Utilities. The royalty would reflect the fact that use of the FirstEnergy name, reputation and goodwill that has economic value that has been created by virtue of the utility's monopoly service, paid for by regulated customers. Otherwise, customers are effectively subsidizing the operations of First Energy Advisors.

Requiring FirstEnergy Advisors to pay a royalty will be fairer for competition. Other states have required royalties to be paid when a utility affiliate uses the utility name for marketing a competitive service.<sup>17</sup> And the royalty should be directly applied as an offset on utility customers' bills, to defray what is in effect a subsidy to the affiliate. The royalty should be based on a percentage of FirstEnergy Advisors' gross revenue.

**C. If the PUCO allows FirstEnergy to use the utilities' name, it should, for the protection of customers require a disclaimer that is clear, conspicuous and concise in all communications with its customers.**

If the PUCO allows FirstEnergy Advisors to use the utilities' name (it should not), to protect consumers its proposed disclaimer<sup>18</sup> for marketing or promotional materials should be revised. The disclaimer should be revised to make certain that customers can readily discern who the solicitation is from and what relationship FirstEnergy Advisors has/ does not have with the regulated utility. This would be consistent with the Attorney Examiner's expectation that FirstEnergy Advisors disclosure to customers be made in an "efficacious manner in all communications with customers."<sup>19</sup>

It is important that customers understand that the energy or services being supplied by FirstEnergy Advisors is not being supplied by any of the FirstEnergy utilities. Customers should also be apprised that the entity offering the energy is separate from the FirstEnergy electric distribution utilities. And customers should be advised that their decision to purchase or not purchase (or use the brokering/advising services) electricity from FirstEnergy Advisors will not impact the utility service (distribution) that they receive from FirstEnergy utilities.

Accordingly, OCC proposes the following disclaimer language:

Suvon, LLC, d/b/a FirstEnergy Advisors is offering to supply electricity. FirstEnergy Advisors is not the same company as FirstEnergy utilities – Ohio Edison Company, the Cleveland Electric Illuminating Company or the Toledo Edison company. Suvon/FirstEnergy Advisors is a separate company from the FirstEnergy utilities. You do not have to buy FirstEnergy Advisors service to continue to receive regulated utility service from any of the FirstEnergy utilities. Your decision to purchase or not purchase electricity from Suvon/FirstEnergy Advisors will not impact the utility service that you may receive from Ohio Edison Company, The Cleveland Electric Illuminating Company, or The Toledo Edison Company. The prices, products and services of Suvon/FirstEnergy Advisors are not regulated by the Ohio Public Utilities Commission.



This disclaimer language is consistent with disclaimer language commonly required by regulatory commissions across the country.<sup>20</sup> It is understandable, concise and conveys what customers should know about the service that FirstEnergy Advisors is offering.

In keeping with the Attorney Examiner's stated expectation that the disclosure be "conspicuous," the disclaimer should appear on the first page or first point where the utility name or logo appears. It should also appear as appropriate and conspicuous type and size. Kentucky requires the disclaimer to be made in capital letters on the first page or at the first point where the utility's name, trademark, logo or brand appears.<sup>21</sup> Connecticut requires that the disclaimers shall be sized and displayed in a way commensurate with the name and logo. Under Connecticut regulations the disclaimer must be at least the larger of one half the size of the type that first displays the name and logo of the utility.<sup>22</sup> Requiring the disclaimer to conform to both of these standards would help ensure that the disclaimer is conspicuous, consistent with the Attorney Examiner's stated expectations.<sup>23</sup>

Currently, on the FirstEnergy Advisors' website the disclaimer is placed at the very end of the webpage in very small print. <https://www.firstenergyadvisors.com/firstenergyadvisors.html>. It is not conspicuous and is located far from the utility logo and name. As presented on its webpage, it does little to apprise customers of the true relationship FirstEnergy Advisors has with FirstEnergy utilities. Its placement on the webpage is inconspicuous, contrary to the Attorney Examiner's stated expectation for a "conspicuous" disclaimer.<sup>24</sup>

Additionally, the disclaimer, as recommended by OCC, should also be part of all advertising or marketing materials, contracts, proposals and bills for non-regulated goods and services. That also appears to be consistent with the Attorney Examiner's announced expectation that the disclosure be included and presented "in all communications with customers."<sup>25</sup> That would include any circulated material used in advertising or soliciting business including, but not

limited to, television, radio, telephone, electronic mail, and in-person contact. This requirement is consistent with regulations in Colorado and New Jersey.<sup>26</sup> This will add additional protection for customers beyond the written disclaimer that FirstEnergy Advisors offered to make for promotional and marketing materials.

Finally, consistent with Nevada and Connecticut regulations,<sup>27</sup> the PUCO should preclude FirstEnergy Advisors from marketing, promoting, or advertising their services or products on FirstEnergy customers' bills, as bill inserts or otherwise. Doing so would help levelize the playing field for competitors of FirstEnergy Advisors who may lack the same access to FirstEnergy utility bills and bill inserts. The existence of a level playing field for competitors is important because consumers rely on the market to bring lower prices and greater innovation.

**D. The PUCO should preclude senior management from FirstEnergy utilities from working in a dual capacity for FirstEnergy Advisors.**

The Auditor pointed out the problems with having the same employees (some of which were executives) working on both regulated and non-regulated activities as part of FirstEnergy Service Corp. The Auditor commented that in 2016, the competitive retail sales responsibilities were transferred from the non-regulated competitive retail affiliate (FirstEnergy Solutions) to FirstEnergy Service Corp., which is not intended to provide unregulated, competitive sales and services.<sup>28</sup> The problems extended to having regulated and non-regulated employees reporting to the same director and executives performing non-regulated activities routinely interacting with management from FirstEnergy Service Corp. (working for regulated activities).

The Auditor commented that this practice makes separation of regulated and competitive information highly challenging.<sup>29</sup> The Auditor noted that the Retail Operations Group of FirstEnergy Service Corp. serves two masters, the unregulated competitive retail sales group and regulated products sold under FirstEnergy utility tariffs. The Auditor described the process as "highly inappropriate" and "an awkward organizational structure."<sup>30</sup> The Auditor recommended

that all FirstEnergy Service employees who support the affiliates' sales operations and customer service be transferred back to the affiliate.<sup>31</sup>

That same recommendation should be applied to the sharing of employees between FirstEnergy Advisors and the regulated utilities. FirstEnergy Service Corp. should not be providing services to FirstEnergy Advisors. Executives working for FirstEnergy Advisors should not be working at the same time for the regulated operations of the FirstEnergy utilities, through FirstEnergy Service Corp. or otherwise.

As reflected in the chart below all of FirstEnergy Advisors' managers hold the highest level executive positions with FirstEnergy Corp and FirstEnergy Services Company. Moreover, two of FirstEnergy Advisors' managers also are directors of the regulated utilities:

<b>COMMON MEMBERS/DIRECTORS/EXECUTIVE OFFICERS</b>		
FirstEnergy Corp/FirstEnergy Service Company <sup>32</sup>	FirstEnergy Advisors <sup>33</sup>	Regulated Utilities <sup>34</sup>
<b>Charles Jones,</b> CEO, (FEC)	<b>Charles Jones,</b> Manager	<b>Charles Jones</b> Director
<b>D.M. Chack,</b> Pres. FE Ohio Utilities (FEC) Sr. VP Mkting/Branding (FESC)	<b>D.M. Chack,</b> Manager	
<b>S.E. Strah,</b> Pres. (FEC) CFO (FESC)	<b>S.E. Strah,</b> Manager	<b>S.E. Strah</b> Director
		J.E. Pearson Director
		S.L. Belcher Director

The concerns about operational control are further exacerbated by the commonality of the most senior key officials in each affiliate. As reflected in the chart below, the senior officers of FirstEnergy Corp and FirstEnergy Service Company are nearly identical to those of the regulated

utilities. And FirstEnergy Advisors shares three of the most senior officers of FirstEnergy Corp. and FirstEnergy Service Corp.

<b>COMMON KEY SENIOR OFFICERS</b>		
FirstEnergy Corp/ FirstEnergy Serv. Co. <sup>35</sup>	FirstEnergy Advisors <sup>36</sup>	Regulated Utilities <sup>37</sup>
Charles Jones, CEO, Pres. Ohio Utilities (FEC)		Charles Jones Director
D.M. Chack, Sr. VP Mkting/Branding (FESC)	D.M. Chack, President	
S.E. Strah, Pres.(FEC) CFO (FESC)	B.W. Reynolds, VP Mkt/Energy Eff.	S.E. Strah CFO
S.L. Belcher Sr VP		S.L. Belcher President
E.L. Yeoah-Amankwah Secretary, Ethics FESC	E.L. Yeoah- Amankwah VP Dep. Gen. Counsel	E.L. Yeoah- Amankwah VP Dep. Gen. Counsel
J.J. Lisowski, Controller Chief Accounting Officer (FESC)	T.M. Ashton Controller	J.J. Lisowski, VP /Controller
R.P., Reffner Gen Counsel FESC		R.P., Reffner Gen Counsel
K.J. Taylor VP, Operations FE Utilities		K.J. Taylor VP
	S.R. Staub VP/Treasurer	S.R. Staub VP/Treasurer
		J.F. Pearson Ex. VP Finance
	L.R. Rader, Director of Sales	
	B.A.Farley V.P. Sales	

The PUCO Audit Report was correct that it was inappropriate to commingle management from the competitive energy sales' affiliate with the senior leadership team of FirstEnergy Service Corp. That is because the competitive affiliate officers would be privy to the regulated utilities' information, through FirstEnergy Service Corp. and vice versa. This is inappropriate and awkward as the Auditor pointed out and makes a Chinese wall impossible to construct.

That same situation is present here and compounded by the fact that the persons holding the highest positions with FirstEnergy Corp and FirstEnergy Services Corp. are nearly identical to those holding the same or similar positions with the FirstEnergy Utilities. All three of FirstEnergy Advisors' members will interact with all of these officials through FirstEnergy Service Corp., at a minimum. Under this proposed management and control structure, FirstEnergy Advisors cannot operate as a fully separated affiliate as is required by law.

In addition, FirstEnergy Advisors' application lists Brian A. Farley as its Vice President of Sales, and Lorraine M. Rader as its Director of Sales. Mr. Farley and Ms. Rader previously served as key members of FirstEnergy Solutions' aggregation team where they obtained significant competitive retail electric market information.<sup>38</sup> It is impossible to separate this information from senior FirstEnergy Utility executives who are controlling FirstEnergy Advisors as the three managers of the limited liability company. This is the type of information-sharing about Ohio's competitive retail electric market that the corporate separation statute intended to preclude.

Enforcing the corporate separation laws and rules and/or strengthening the corporate separation plan is particularly important with regard to the sharing or co-mingling of senior management in the instant case. Neither the FirstEnergy utilities or FirstEnergy Advisors have explained how the same managers who run the regulated utilities and unregulated competitive

affiliate, FirstEnergy Advisors, can separate their knowledge of the regulated business, operations, and market information from their knowledge of the affiliate's business, operations, and market information. In fact, real separation cannot occur to protect competitive markets and consumers that benefit from these markets when functioning properly. It is the same type of issue that the Auditor found problematic with respect to FirstEnergy Solutions' employees working on and in conjunction with FirstEnergy Service Corp. employees.

### **III. CONCLUSION**

Ohio's corporate separation rules are intended, for consumer protection, to foster a level playing field where all market participants can compete freely and fairly for consumers' business. The rules should prevent an unfair competitive advantage for certain participants, prevent cross-subsidization between regulated and unregulated affiliates, and prohibit the abuse of market power by the regulated utility or other market participants.<sup>39</sup> These issues are important to customers who rely on the competitive market to produce reasonably priced retail electric generation service under the policy of Ohio in R.C. 4928.02(A).

The independent auditor in this proceeding has made reasonable recommendations for changes to the way that FirstEnergy and its marketing affiliate operate. The PUCO should apply the Auditor's recommendations to the operation of its current marketing affiliate, FirstEnergy Advisors. And the PUCO should adopt OCC numerous recommendations on the disclaimer if FirstEnergy Advisors is permitted to use the FirstEnergy name and/or logo.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Supplemental Comments was served via electronic transmission, to the persons listed below, on this 29th day of May 2020.

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## Endnotes

<sup>1</sup> *In the Matter of the Review of FirstEnergy's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, OCC Comments (Dec. 31, 2018).

<sup>2</sup> *Id.*, Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio, Final Report (May 14, 2018).

<sup>3</sup> *Id.*, Entry ¶7 (Apr. 29, 2020).

<sup>4</sup> *In the Matter of the Application of Suvon, LLC d/b/a FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Finding and Order (Apr. 22, 2020)

<sup>5</sup> *Id.* at ¶20.

<sup>6</sup> *Id.*; OCC, RESA and NOPEC, Application for rehearing (May 22, 2020).

<sup>7</sup> In light of the numerous changes, including the deferral of corporate separation issues from the FirstEnergy Advisors certification case, the PUCO should freely allow parties to file comments and find good cause for intervention to be granted to parties who have not previously intervened, including NOPEC and Vistra.

<sup>8</sup> *Id.*, Compliance Audit Report at 98.

<sup>9</sup> Deceptive Advertising is prohibited under Section 5 of the Federal Trade Commission act. 15 U.S.C. §45. The FTC generally considers advertising deceptive if at least a substantial minority of consumers acting reasonably takes a particular message from an advertisement, and if that message is likely to mislead consumers to their detriment. See Federal Trade Commission's Policy Statement on Deception, letter to Hon John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, JU. S. House of Representatives (Oct. 14, 1983), appended to *Cliffdale Associates*, 103 F.T.C. 110 (1984).

<sup>10</sup> For instance, on FirstEnergy's Advisors website it makes claims that appear to allude to experience and familiarity gained from having worked with/for FirstEnergy utilities. See

<sup>11</sup> Ill. Admin. Code 83 §412.105 (2017): "a) An RES shall not utilize the logo of a public utility in any manner.b) An RES shall not utilize the name of a public utility in any manner that is deceptive or misleading, including, but not limited to, implying or otherwise leading a customer to believe that an RES is soliciting on behalf of or is an agent of a utility. c) An RES shall not utilize the name, or any other identifying insignia, graphics or wording that has been used at any time to represent a public utility company or its services, to identify, label or define any of its electric power and energy service offers.d) Notwithstanding anything in this Subpart B or elsewhere in this Part 412, an RES that is an affiliate of an Illinois public utility, and that was doing business in Illinois providing RES service as of January 1, 2016, may continue to use that public utility's name, logo, identifying insignia, graphics, or wording in its business operations occurring outside the service territory of the public utility with which it is affiliated."

<sup>12</sup> Manoj Hastak, Energy Company Advertising Study (1998). (Attachment A).

<sup>13</sup> Jacob Jacoby & George J. Szybillo, *Why Disclaimers Fail*, 84 The Trademark Reporter 224, 236 (1994).

<sup>14</sup> *Id.* at 237.

<sup>15</sup> Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising* 31(2) Journal of Public Policy & Marketing 293, 302 (2012).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., Maine legislation: 35 A.M.R.S.A. §707(3)(G); Maryland: [2000 Md. PSC LEXIS 48, \\*6, 91 Md. P.S.C. 312, 202 P.U.R.4th 177 \(Md. P.S.C. July 1, 2000\)](#); New York: [2003 N.Y. PUC LEXIS 50, \\*19-20 \(N.Y.P.S.C. January 30, 2003\)](#).

<sup>18</sup> The Attorney Examiner took administrative notice in this proceeding of FirstEnergy Advisors supplemental filing in its certification case, which contained FirstEnergy Advisors' disclaimer. See Entry at ¶10 (Apr. 29, 2020).

<sup>19</sup> *In the Matter of the Application of Suvon d/b/a FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Finding and Order at ¶19 (Apr. 22, 2020).

<sup>20</sup> See, e.g., **Texas**: Tex Util. Code Ann. § 39.157 (2011) A utility does not...allow a competitive affiliate, before September 1, 2005, to use the utility's corporate name, trademark, brand, or logo unless the competitive affiliate includes on employee business cards and in its advertisements of specific services to existing or potential residential or small commercial customers locating within the utility's certificated service area a disclaimer that states, "(Name of competitive affiliate) is not the same company as (name of utility) and is not regulated by the Public Utility Commission of Texas, and you do not have to buy (name of competitive affiliate)'s products to continue to receive quality regulated services from (name of utility)."; KRS 278.2213(13) :A utility's name, trademark, brand, or logo shall not be used by a non-regulated affiliate in any type of visual or audio media without a disclaimer and that the Commission shall approve any disclaimer prior to use by the utility's affiliate; **Kentucky**: 807 Ky. Admin. Regs. 5:080, Section 6 (2001) Disclaimer to be Employed When an Affiliate of an Affected Utility Uses the Utility's Name, Trademark, Brand, or Logo: The disclaimer used by an affiliate of an affected utility shall comply with the following requirements: (1) The disclaimer shall state that "(affiliate's name) is not the same company as (utility's name). (Affiliate's name) is not regulated by the Kentucky Public Service Commission. You do not have to buy (the affiliate's) (products or services, as applicable) in order to continue to receive quality regulated services from the utility.";(2) If an affiliate of an affected utility uses the utility's name, trademark, brand, or logo in a print format, the disclaimer shall appear in capital letters on the first page or at the first point where the utility's name, trademark, logo or brand appears;(3) If an affiliate of an affected utility uses the utility's name, trademark, brand, or logo in a televised format, the disclaimer shall appear at the first point at which the utility's name, trademark, logo, or brand appears; and(4) If an affiliate of an affected utility uses the utility's name in an audio format, the disclaimer shall be spoken at the close of the advertisement.; **New Jersey**: N.J. Admin. Code § 14:4-3.5(k) (2013) A related competitive business segment of a public utility holding company shall not trade upon, promote, or advertise its relationship with the electric and/or gas public utility, nor use the electric and/or gas public utility's name and/or logo in any circulated material, including, but not limited to, hard copy, correspondence, business cards, faxes, electronic mail, electronic or

hardcopy advertising or marketing materials, unless it discloses clearly and conspicuously or in audible language that: 1. The PUHC or related competitive business segment of the public utility holding company “is not the same company as the electric and/or gas public utility”; 2. The PUHC or related competitive business segment of the public utility holding company is not regulated by the Board; and 3. “You do not have to buy products in order to continue to receive quality regulated services from the electric and/or gas public utility.” (l) The requirement of the name and/or logo disclaimer set forth in (k) above is limited to the use of the name and/or logo in New Jersey; **Utah:** Utah Admin.Code r. § R746-460-4(1) (2019) If an affiliate or licensee of a Large-Scale Utility, or a licensee of a Large-Scale Utility's affiliate, engages in unsolicited marketing of products or services directed to a Large-Scale Utility's customers in Utah using a logo or name brand that is substantially similar to that of the Large-Scale Utility, any written marketing materials shall be drafted to avoid customer confusion about the licensee or affiliate relationship, and, with respect to Small Business and Residential Customers, shall also include a clear and prominent statement that: (a) the product or service is not being offered by the Large-Scale Utility; (b) the entity offering the product or service is separate from the Large-Scale Utility; and (c) the decision to purchase or not purchase the product or service will not impact Large-Scale Utility service; **Oregon:** Or. Admin. R. 860-038-0520 (2006) An electric company may allow its Oregon affiliates and its competitive operations the use of its corporate name, trademark, brand, or logo in advertisements of specific electricity services to existing or potential consumers located within the electric company's service area, as long as the Oregon affiliate or its competitive provider includes a disclaimer in its communications. The disclaimer must be written in a bold and conspicuous manner or be clearly audible, as appropriate for the communication medium. The disclaimer must be included in all print, auditory and electronic advertisements. (1) The disclaimer for an Oregon affiliate must state the following: [Name of Oregon affiliate] is not the same company as [name of electric company] and is not regulated by the Public Utility Commission of Oregon. You do not have to buy [name of Oregon affiliate]'s products or services to continue to receive your current electricity service from [name of electric company]. (2) The disclaimer for a competitive operation must state the following: ‘You do not have to buy [product/service name] to continue to receive your current electricity service from [name of electric company].’; **Pennsylvania:** 52 Pa. Code § 54.122(10) (2000) An electric distribution company or its affiliate or division may not state or imply that any delivery services provided to an affiliate or division or customer of either are inherently superior, solely on the basis of their affiliation with the electric distribution company, to those provided to any other electric generation supplier or customer or that the electric distribution company's delivery services are enhanced should supply services be procured from its affiliate or division. When an electric distribution company's affiliated or divisional supplier markets or communicates to the public using the electric distribution company's name or logo, it shall include a disclaimer stating that the affiliated or divisional supplier is not the same company as the electric distribution company, that the prices of the affiliated or divisional supplier are not regulated by the Commission and that a customer is not required to buy electricity or other products from the affiliated or divisional supplier to receive the same quality service from the electric distribution company. When an affiliated or divisional supplier advertises or communicates through radio, television or other electronic medium to the public using the electric distribution company's name or logo, the affiliated or divisional supplier shall include at the conclusion of any communication a disclaimer that includes all of the disclaimers listed in this paragraph; **Connecticut:** (c) A gas company's name,

logo or trademark may be used by an affiliate provided such use is not misleading. When an affiliate markets or communicates to the public using a gas company's name, logo or trademark, it shall include a legible disclaimer that clearly and conspicuously states that: (1) The affiliate is not the same company as the gas company and the gas company has separate management and separate employees;(2) If the affiliate is an unregulated affiliate, the disclaimer shall state that the affiliate is not regulated by the Department or in any way sanctioned by the Department, and the prices of the affiliate are not regulated by the Department;(3) Purchasers of goods or services from an affiliate will receive no preference or special treatment from the gas company; and(4) A customer does not have to buy natural gas or other goods or services from the affiliate to receive the same quality of service from the gas company. (d) The disclaimer required in subsection (c) of this section shall be sized and displayed in a way that is commensurate with the name and logo so that the disclaimer is at least the larger of one-half the size of the type that first displays the name and logo or the predominant type used in the communication.

<sup>21</sup> 807 Ky. Admin. Regs. 5:080, Section 6 (2001): “If an affiliate of an affected utility uses the utility's name, trademark, brand, or logo in a print format, the disclaimer shall appear in capital letters on the first page or at the first point where the utility's name, trademark, logo or brand appears;”

<sup>22</sup> Conn. Agencies Regs. §16-47a-6(d) (2011): The disclaimer required in subsection (c) of this section shall be sized and displayed in a way that is commensurate with the name and logo so that the disclaimer is at least the larger of one-half the size of the type that first displays the name and logo or the predominant type used in the communication.

<sup>23</sup> *In the Matter of the Application of Suvon d/b/a FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Finding and Order at ¶19 (Apr. 22, 2020).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Colo. Code Regs. §723-4:4505 (2018): “Such disclosure to prospective customers in Colorado shall be included in all Colorado advertising or marketing materials, proposals, contracts, and bills for non-regulated goods and services, regardless of whether the Colorado utility provides such non-regulated goods or services in Colorado directly or through a division or affiliate;” N.J. Admin. Code §14:4-3.5 “A related competitive business segment of a public utility holding company shall not trade upon, promote, or advertise its relationship with the electric and/or gas public utility, nor use the electric and/or gas public utility's name and/or logo in any circulated material, including, but not limited to, hard copy, correspondence, business cards, faxes, electronic mail, electronic or hardcopy advertising or marketing materials, unless it discloses clearly and conspicuously or in audible language that\*\*\*”

<sup>27</sup> Nev. Admin. Code §704.7913 (1999): “1. An Affiliate \*\*\* (b) Shall not use space in the correspondence of the distribution company or any other form of information about the distribution company for the purpose of advertising the services of the affiliate;” Conn. Agencies Regs. §16-47a 6 “(b) A gas company shall not promote or market any goods or services offered by an unregulated affiliate, or engage in joint promotions, advertising or marketing programs of any sort with an unregulated affiliate. A gas company shall not authorize any unregulated

affiliate marketing, promotions or advertising to be included on customers' bills, as bill inserts or as a link on the gas company's website.”

<sup>28</sup> Compliance Audit at 34.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 39.

<sup>32</sup> See [firstenergycorp.com/investor/corporate\\_governance/officers\\_and\\_directors.html](http://firstenergycorp.com/investor/corporate_governance/officers_and_directors.html); [investors.firstenergy.com](http://investors.firstenergy.com)

<sup>33</sup> See Suvon Initial Certification Application, Case No. 20-103-EL-CRS, Exhibit A-12 (January 17, 2020).

<sup>34</sup> See Companies’ Annual Reports, 2018 4Q FERC Form 1.

<sup>35</sup> See [firstenergycorp.com/investor/corporate\\_governance/officers\\_and\\_directors.html](http://firstenergycorp.com/investor/corporate_governance/officers_and_directors.html); [investors.firstenergy.com](http://investors.firstenergy.com)

<sup>36</sup> See Suvon Initial Certification Application, Case No. 20-103-EL-CRS, Exhibit A-12 (January 17, 2020).

<sup>37</sup> See Companies’ Annual Reports, 2018 4Q FERC Form 1.

<sup>38</sup> See FirstEnergy Advisors Application, Case No. 20-103-El-CRS, Exhibit B-2 and B-3.

<sup>39</sup> Ohio Adm. Code 4901:1-37-02.



**ENERGY COMPANY ADVERTISING STUDY**  
**Preliminary Summary of Findings**

by

**Manoj Hastak, Ph.D.**

**Conducted for the Public Utilities Commission of Nevada**

**November 1998**

### Objectives

1. To assess whether or not, and the extent to which consumers confuse an affiliate with a name similar to that of the parent regulated electric company with the parent company.
2. To assess whether or not, and the extent to which a disclosure specifying the nature of the relationship between the affiliate and parent company (provided by the Public Utilities Commission of Nevada) alleviates this confusion,
3. To assess whether or not, and the degree to which the use of a new unfamiliar name for the affiliate company together with a disclosure specifying the nature of the relationship between the affiliate and parent company (provided by the Public Utilities Commission of Nevada) alleviates this confusion, and
4. To assess consumer comprehension of the disclosure(s).

### Design

1. **Stimuli:**

\* print ads for three electric companies: Nevada Power Energy, Horizon Energy, Ultima Energy

2. **Design:**

\* approximately 400 respondents.

\* respondents assigned to one of 4 conditions:

<u>Cell #</u>	<u>n</u>	<u>Ad #1</u>	<u>Ad #2</u>
1	100	Nevada Power Energy	Horizon Energy
2	100	Nevada Power Energy (with disclosure)	Horizon Energy
3	100	Ultima Energy	Horizon Energy
4	100	Ultima Energy (with disclosure)	Horizon Energy

**3. Procedure:**

for all cells

- \* introduction and exposure to ads
- \* choice
- \* reasons for choice
- \* direct measure of potential confusion between affiliate and parent company

for cells #2 and #4 only

- \* reexposure to ad for affiliate with focus on disclosure
- \* measure of disclosure comprehension
- \* remeasure of potential confusion between affiliate and parent company

**4. Data Collection:**

- \* respondents screened for (a) residents of Clark County, (b) people who deal with electric bill, (c) employees of electric company, and (d) other standard screeners.
- \* quotas for sex (M/F) and age (21-39/40-64).
- \* data collection (in progress) by Consumer Research Company at their Las Vegas facility. Preliminary results based on 170 completed interviews.



**Results for Key Questions**

	<u>Cell #1</u>	<u>Cell #2</u>	<u>Cell #3</u>	<u>Cell #4</u>
<i><b>Q1. Which one of the two companies -- Horizon Energy Company or Nevada Power Energy/ Ultima Energy Company -- would you choose as your electric company?</b></i>				
Nevada Power Energy/ Ultima Energy Company	69.4%	58.7%	40%	36%
Horizon Energy Company	28.6%	26.1%	52%	42%
Both are equal/ Can't choose	2.0%	15.2%	0%	14.0%
Don't know or not sure	0%	0%	8.0%	8.0%
<i><b>Q1a. What are the key reasons why you selected Nevada Power Energy/ Ultima Energy Company rather <del>(than)</del> Horizon Energy Company?</b></i> <i>HA</i>				
% responses showing confusion between affiliate and parent company	24.5%	15.2%	0%	0%

	<u>Cell #1</u>	<u>Cell #2</u>	<u>Cell #3</u>	<u>Cell #4</u>
<i>Q2. I would like to ask you a question about the two companies -- Horizon Energy Company and Nevada Power Energy Company -- whose ads you just saw. Is one of these companies your current electric service provider, or is neither one of these companies your current electric service provider, or don't you know?</i>				
Yes, one of these is my current electric service provider	93.8%	50%	0%	4%
No, neither one of these is my current electric service provider	4.1%	50%	96%	82%
Don't know or not sure	2.1%	0%	4%	14%
<i>Q2a. Which one of these two companies -- Horizon Energy Company or Nevada Power Energy/ Ultima Energy Company -- is your current electric service provider?</i>				
Nevada Power Energy/ Ultima Energy Company	93.8%	47.8%	0%	4%
Horizon Energy Company	0%	2.2%	0%	0%
Don't know or not sure	0%	0%	0%	0%
Not asked	6.2%	50%	100%	96%

	<u>Cell #1</u>	<u>Cell #2</u>	<u>Cell #3</u>	<u>Cell #4</u>
<i><b>Q3a. (Asked after respondents have been reexposed to affiliate ad and asked to attend to boxed disclosure information) What does this information communicate to you about Nevada Power Energy/ Ultima Energy Company?</b></i>				
Nevada Power Energy/ Ultima Energy is an affiliate of Nevada Power Company	N/A	33.3%	N/A	8%
Nevada Power Energy/Ultima Energy is not the same corporation as Nevada Power Company	N/A	41.7%	N/A	48%
Nevada Power Energy/ Ultima Energy has separate management/employees than Nevada Power Company	N/A	20.8%	N/A	12%
Nevada Power Energy/ Ultima Energy is not entitled to any special endorsement from the Public Utilities Commission of Nevada	N/A	8.3%	N/A	2%
Safety/ Reliability/ Cost of Distribution services received by customers of Nevada Power Energy/ Ultima Energy Company will be equivalent to that received by customers of unaffiliated companies.	N/A	4.2%	N/A	18%
<i><b>Q3b. Based on all the information that has been provided to you, would you say that Nevada Power Energy/ Ultima Energy is your current electric service provider, is not your current electric service provider, or don't you know?</b></i>				
is current electric service provider	N/A	39.1%	N/A	6%
is not current electric service provider	N/A	58.7%	N/A	88%
don't know or not sure	N/A	2.2%	N/A	6%

### Conclusions

1. There is clear evidence (both direct and indirect) that consumers confuse Nevada Power Energy Company with Nevada Power Company.
2. There is evidence (both direct and indirect) that the disclosure reduces, but does not eliminate consumer confusion between Nevada Power Energy Company and Nevada Power Company. Specifically, (a) more consumers provide responses indicating they chose Nevada Power Energy because they may have confused it with Nevada Power when there is no disclosure (24.5%) versus when there is a disclosure (15.2%), and (b) when asked a series of direct questions (Q2, Q2a) more respondents say that Nevada Power Energy is their current service provider when there is no disclosure (93.8%) versus when there is a disclosure (47.8%).
3. There is clear evidence (both direct and indirect) that the use of an unfamiliar name and a disclosure virtually eliminates consumer confusion between the affiliate (Ultima Energy) and Nevada Power Company. Specifically, (a) no consumers provide responses indicating they chose Ultima Energy because they may have confused it with Nevada Power, and (b) When asked a series of direct questions (Q2, Q2a) only 4% of the respondents say that Ultima Energy is their current service provider.
4. The data suggest that consumers comprehend certain communication points in the disclosure better than others. The fact that the affiliate is not the same entity as the parent company appears to communicate the best.

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Summary: Comments Supplemental Comments by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.