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

NORTHEAST OHIO PUBLIC ENERGY COUNCIL's
SUPPLEMENTAL REPLY COMMENTS

I. INTRODUCTION

The Northeast Ohio Public Energy Council's ("NOPEC") position in this proceeding, and in the related Certification Case,[1] is clear. The FirstEnergy Ohio electric distribution utilities' ("EDUs")[2] and FirstEnergy Advisors' combined management structure violates R.C. 4928.17. R.C. 4928.17(A)(1) requires that FirstEnergy Advisors must be operated as a ***fully separated affiliate*** from the EDUs and the Commission's rules state so. See, 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."); see, also, O.A.C. 4901:1-37-04(A)(3) ("A electric utility's operating employees and those of its affiliates shall function independently of each other."). By co-mingling the EDUs' and FirstEnergy Advisors' management teams, each manager's knowledge of the business plans and opportunities arising from his regulated duties cannot be separated from his knowledge of the business plans and opportunities arising from his CRES duties, and vice versa. Moreover, the shared employee

[1] See Suvon, LLC d/b/a FirstEnergy Advisors ("FirstEnergy Advisors") certification case, Case No. 20-103-EL-AGG ("Certification Case"), in which FirstEnergy Advisors was certified as a competitive retail electric service ("CRES") provider to offer power broker and aggregation services.

[2] The EDUs include The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company.

provisions of O.A.C. 4901:1-37-04(A)(4) do not apply because sharing senior management under these circumstances would violate several provisions of the Code of Conduct contained in O.A.C. 4901:1-37-04(D), as discussed below. In addition, FirstEnergy Advisors use of the "FirstEnergy" trade name violates O.A.C. 4901:1-37-04(D)(7), (8) and (9).

The diverse group of intervenors in this proceeding is in unanimous agreement with these positions:

- The Office of the Ohio Consumers' Counsel ("OCC") opposes FirstEnergy Advisors' use of the "FirstEnergy" name and asks the Commission to follow the lead of the Illinois Commerce Commission, which prohibits utilities and their competitive affiliates from sharing names and logos.[3] OCC also agrees that the corporate separation rules preclude senior management of the EDUs from sharing a dual capacity with FirstEnergy Advisors.[4]
- The Retail Energy Supply Association ("RESA") opposes FirstEnergy Advisors' use of the "FirstEnergy" name because if provides First Energy Advisors an undue preference or advantage over other CRES providers in violation of R.C. 4928.17(A)(3).[5] RESA agrees that if FirstEnergy Advisors' executive management team and employees also perform services for the EDUs, the two entities are not "fully separate utilities" as required by R.C. 4928.17(A).[6] Moreover, RESA agrees with NOPEC that housing all FirstEnergy Advisors' employees with the EDUs at 76 South Main Street, Akron, Ohio is highly inappropriate, especially when the EDUs' approved corporate separation plan requires that regulated and non-regulated employees be physically separated where practical.[7]
- Vistra Energy Corp. ("Vistra") also explains why FirstEnergy Advisors' use of the "FirstEnergy" name and logo violates Ohio's EDU corporate separation laws. It cites Texas decisions and Illinois rules that prohibit the practice.[8] Vistra also agrees that FirstEnergy Advisors' three executive managers should not be shared with the EDUs, citing the requirement in O.A.C. 4901:1-37-04(D)(3) that the EDUs must contemporaneously share information with all CRES providers. By having joint management, FirstEnergy Advisors necessarily would receive information from the EDUs before any other CRES provider.[9] Vista also explains why the EDUs cost

[3] OCC Supplemental Comments at 4.

[4] *Id.* 8.

[5] RESA Supplemental Comments at 5.

[6] *Id.* at 6.

[7] *Id*. at 7.

[8] Vistra Supplemental Comments at 14.

[9] *Id*. at 15.

allocation manual is deficient under O.A.C. 4901:1-37-08(D), including that it doesn't list the duties of shared employees[10] NOPEC sought this information through discovery in the Certification Case to support its position that shared management violated corporate separation rules; however, discovery and hearing on those issues were denied. This information should be provided in this proceeding and in the Certification Case for the Commission's appropriate deliberations.

- Interstate Gas Supply ("IGS") agrees that FirstEnergy Advisors should be prohibited from using the "FirstEnergy" name because it gives an undue preference to FirstEnergy Advisors in violation of R.C. 4928.17(A)(3). IGS also cites to the Texas decision preventing shared used of names and logos by a utility and its competitive affiliates.[11]

NOPEC submits that the weight of these comments, and those that follow, require that FirstEnergy Advisors immediately cease using the FirstEnergy name and the EDUs and FirstEnergy Advisors immediately separate their management teams. At a minimum, the Commission should order that a hearing be held in this proceeding, or a rehearing held in the Certification Case, to address these issues, with sufficient time for discovery.

II. REPLY COMMENTS

A. The mootness of issues as to the defunct FirstEnergy Solutions does not prevent the Commission from considering if the EDUs' corporate separation plan is compliant with Ohio law.

The EDUs assert that the Audit Report[12] is now moot as to FirstEnergy Solutions ("FES"), because FES emerged from bankruptcy as an unaffiliated power marketer, Energy Harbor LLC.[13] It is true that the Audit Report's recommendations as to FES cannot be implemented, *e.g.*, FES n/k/a Energy Harbor has removed shared employees from FirstEnergy Service Company ("FESC") and FES n/k/a Energy Harbor no longer uses the "FirstEnergy" name. However, these same issues remain germane to the EDUs' corporate separation plan with

[10] *Id*. at 17.
[11] IGS Supplemental Comments at 9-12.

[12] See SAGE Management Consultants, LLC Final Report for Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio (filed May 14, 2018) ("Audit Report").

[13] EDUs' Supplemental Comments at 2.

respect to their other affiliates, especially the recently certificated power broker/aggregator FirstEnergy Advisors. As discussed below, the EDUs and FirstEnergy Advisors are violating the same rules that FES violated by using the "FirstEnergy" name. Moreover, NOPEC is aware from public records that FirstEnergy Advisors, like FES, is sharing its executives and other employees with FESC, as well as the EDUs,[14] in violation of various provisions of the Code of Conduct found O.A.C. 4901:1-37-04.

These issues could have been resolved, and on rehearing should be resolved, in FirstEnergy Advisors' Certification Case, after ample time for discovery and hearing. It is in the Certification Case that FirstEnergy Advisors could address the duties its shared employees perform.[15] It is in the Certification Case that FirstEnergy Advisors could attempt to explain how its proposed disclaimer that it is an EDU affiliate permits it to use the "FirstEnergy" name[16] when a conflicting Code of Conduct provision clearly prohibits the disclosure of an affiliate relationship with the EDUs.[17] These questions are left unanswered. Ironically, by transferring these issues from the Certification Case to this proceeding, and taking administrative notice[18] of FirstEnergy Advisors' certification application, the Commission is requiring the EDUs to expend their time and resources to defend the actions of FirstEnergy Advisors, which has not made an

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[14] See NOPEC Supplemental Comments at 6-9; OCC's Supplemental Comments at 8-12.

[15] FE is required to include in its cost allocation manual a list of the duties shared employees perform. See O.A.C. 4901:1-37-08. This information is vital to determining whether such shared use violates the Code of Conduct provisions in O.A.C. 4901:1-37-04(D). However, this information is missing from the EDUs' cost allocation manual, as well as other pertinent information, such as board of director meetings. NOPEC requested this information in the Certification Case but was denied the opportunity for discovery.

[16] See Certification Case, Supplemental Exhibit B-2 (filed April 1, 2020).

[17] See O.A.C. 4901:1-37-04(D)(7).

[18] It is error for the Attorney Examiner in the April 29, 2020 entry in this case to take administrative notice of FirstEnergy Advisors' application, as supplemented, in the Certification Case. Intervenors have had no meaningful opportunity through discovery or hearing to rebut what erroneously are considered "facts" in this proceeding. See, *e.g.*, *Allen v. Pub. Utilities Com'n of Ohio*, 40 Ohio St.3d 184, 185, 532 N.E.2d 1307, 1309 (1988) ("*Allen*"). NOPEC was denied discovery and hearing in the certification case and FirstEnergy Advisors is not party to this proceeding to test the accuracy of its statements.

appearance in this proceeding. This is but another example of how the EDUs are permitted to provide preferential treatment and subsidies to FirstEnergy Advisors in violation of the Commission's corporate separation rules and Code of Conduct.

To the extent the Commission wishes to fully consider the Audit Report's recommendations regarding FES as analogous to FirstEnergy Advisors' provision of power broker and aggregator services, it should require a supplemental audit of the EDUs' relationship with FirstEnergy Advisors, join FirstEnergy Advisors as a party to this proceeding, and provide ample time for discovery and hearing.

B. FirstEnergy Advisors' supplemental exhibits to its certification application fail to address whether the Commission's corporate separation rules are violated if a CRES provider is managed and controlled by the same individuals that control its affiliated EDUs.

The EDUs rely on FirstEnergy Advisors' self-serving statements in the supplemental exhibits to its certification application in an attempt to show that the EDUs are complying their corporate separation plan. FirstEnergy Advisors' supplemented exhibits fail to show how the same senior individuals who run the EDUs and FirstEnergy Advisors can separate their knowledge of the EDUs' business plans and market information from their knowledge of FirstEnergy Advisors' business plans and operations. The supplemental information attempts to explain (1) that the cost and time of shared services (through FESC) will be properly allocated to the cost allocation manual, (2) that sales and "customer-facing" employees will not have access to regulated distribution and transmission information, (3) that FirstEnergy Advisors will not receive preferential treatment from the EDUs, and (4) that FirstEnergy Advisors' proposed marketing/advertising disclaimer will ensure that customers know it is separate from other FirstEnergy affiliates, even though the Commission's corporate separation rules require FirstEnergy Advisors not to disclose its affiliation with the EDUs.

These explanations fail to address how the EDUs' senior executives prevent sharing regulated information with themselves, considering they also form the same management team of the supposedly structurally separated affiliate housed in the same offices as the EDUs. The following are two examples[19] of how the shared management and control structure proposed in the Certification Case application present clear opportunities for abuses of the corporate separation rules, and illustrate how the words in applicant's supplemental exhibits are meaningless to protect Ohio competitive retail electric markets.

- Consider a developer who approaches one of the EDUs about a new project – a major manufacturing facility or a new subdivision of homes – and needs to arrange for regulated transmission or distribution services. Certainly, some or all of the following EDU executives will know of the proposed major development: Chuck Jones, CEO of FirstEnergy Corp/FirstEnergy Service Company and a director of each of the EDUs; Steve Strah, President of FirstEnergy Corp, Controller for FirstEnergy Service Company and a director of each of the EDUs; and Dennis Chack, Senior Vice President Marketing/Branding of FirstEnergy Service. Conveniently, all three executives also are the managers who control FirstEnergy Advisors, and Mr. Chack is its President. While learning of the proposed EDU development, they simultaneously will learn of the opportunity for their non-regulated affiliate, FirstEnergy Advisors, to make a brokerage fee by arranging for the development's power supply, before any other non-affiliated CRES provider in Ohio has knowledge.

- Consider an EDU employee or officer who meets with an elected official of a community in the EDU's service territories in a government relations context. The community has an existing or is considering a new governmental aggregation program in its community. Nothing in this supplemental FirstEnergy Advisors' filing prevents the EDU employee or officer from suggesting to the elected official that he or she contact a FirstEnergy Advisors employee or officer who can provide aggregation service to the community, or even introduce them. Or to walk down the hallway at the same 76 South Main Street, Akron offices the EDUs and FirstEnergy Advisors are sharing and mention the business opportunity to the FirstEnergy Advisors' employee or officer since that represents a potential fee for FirstEnergy Advisors. This is not a legally separated EDU affiliate because it cannot be if the same people are running both companies with the same profit motive.

[19] Of course, discovery and hearing are the tools by which to learn of the affiliates' actual practices and the extent of the shared management structure's violation of the corporate separation rules.

1. Allocating the cost and time of shared services to the cost allocation manual will not prevent market power abuses and cross-subsidization.

The EDUs' rely on FirstEnergy Advisors' supplemental exhibits filed in the Certification Case to claim that FirstEnergy Advisors will comply with the EDUs' corporate separation requirements. The EDUs claim that compliance is met merely by allocating the cost and time of shared service to the cost allocation manual. These allocations do nothing to prevent the cross subsidization and market power abuses inherent in comingling the EDUs' and FirstEnergy Advisors' management teams. To be clear, NOPEC's concern with this application is not that a human resources employee will record her time on the wrong books, as FirstEnergy Advisors' supplement presumes. Rather, the extreme danger is that, by virtue of having the same management and control team, FirstEnergy Advisors will have knowledge of the EDUs' business plans, and have the opportunity to solicit and win new customers before its competitors, as described in the two examples above. Thus, by being in a position of control over the EDUs and FirstEnergy Advisors at the same times, the common management team is able to subsidize the operations of FirstEnergy Advisors with new business it is aware of in the EDU service territories. That violates R.C. 4928.02(H)[20] and 4928.17(A)(2) ***per se***.[21]

More importantly, the management and control structure represents a textbook classic example of market power abuse. The common management, wearing their EDU hats, represents the monopoly provider of distribution and transmission services. New customers must come to

[20] It is the policy of the state to:

> (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa…

See, also, O.A.C. 4901:1-37-04(A)(3) and 4901:1-37-04(D)(6).

[21] R.C. 4928.17(A) requires corporate separation plans to comply with R.C. 4928.02, and R.C. 4928.17(A)(2) specifically requires that that plan prevent "unfair competitive advantage."

them to establish service, and existing EDU customers and communities all have EDU service or government relations representatives assigned to them. It's an abuse of that monopoly market power when the same EDU management team, wearing their FirstEnergy Advisors' CRES hats, can be the first to learn of the prospective new EDU customers or of the needs of existing EDU customers and the first to solicit them to arrange their power supply. That violates R.C. 4928.02(I)[22] and 4928.17A)(1).[23]

2. Limiting distribution and transmission information to sales employees makes no difference when the persons controlling FirstEnergy Advisors possess insider knowledge of the EDUs' operations and the prohibited information.

O.A.C. 4901:1-37-04(D)(3) prohibits CRES employees from having access to any information about the EDUs' transmission and distribution system that is not "contemporaneously available" to nonaffiliated CRES providers. FirstEnergy Advisors' supplemental exhibits suggest that its application complies with the prohibition because its salespersons and "customer-facing" employees do not have physical or electronic access to this EDU information. As the two examples above show, FirstEnergy Advisors will have instantaneous knowledge of the EDUs' plans to extend distribution and/or transmission plant to serve a major new development, or community elected officials' intentions to establish or change governmental aggregation in their communities, because their management is one and the same. Because of this common management and control, it is impossible for the EDUs to share this information contemporaneously with the FirstEnergy Advisors and its nonaffiliated CRES competitors. FirstEnergy Advisors' management structure ***ab initio*** violates O.A.C. 4901:1-37-

[22] It is the policy of the state to:

> (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power.

[23] R.C. 4928.17(A) requires corporate separation plans to comply with R.C. 4928.02, and R.C. 4928.17(A)(2) specifically requires that that plan prevent "the abuse of market power." See, also, O.A.C. 4901:1-37-04(D)(8).

04(D)(3). Moreover, to the extent the EDUs rely of FERC classifications to support their positions,[24] FERC regulations do not control this proceeding; Ohio law does.

3. FirstEnergy Advisors will receive preferential treatment from the EDUs.

The EDUs assert that they "have and will continue to treat FirstEnergy Advisors the same as they would ***any competitive affiliate***, in compliance with their corporate separation plan."[25] Emphasis supplied. The EDUs misstate Ohio law. The appropriate standard is to treat FirstEnergy Advisors the same as any ***non-affiliated CRES*** provider. See R.C. 4928.17(A)(3), which prohibits an EDU from extending "any undue preference or advantage to any affiliate." Using the examples above, each time the EDU develops plans to serve a new or expanding customer, or meets with an existing EDU customer community leader, FirstEnergy Advisors also learns of a sales opportunity, because the management of the two is identical. FirstEnergy Advisors receives preferential treatment by learning of this sales opportunity before its unaffiliated CRES competitors.

The two examples NOPEC offers above shows that the proposed shared EDU/FirstEnergy Advisors' management arrangement will not prevent, but actually would promote (1) the EDUs' subsidization of FirstEnergy Advisors' business development efforts, (2) the use of the EDUs' market power to drive business to its affiliate, and (3) the EDUs' preferential treatment of FirstEnergy Advisors by providing it information before any other unaffiliated CRES provider.

[24] EDUs' Supplemental Comments at 3.

[25] *Id.*

4. FirstEnergy Advisors' proposed "disclaimer" itself violates O.A.C. 4901:1-37-04(D)(7) because it "indicates" that FirstEnergy Advisors is affiliated with the EDUs.

Although FirstEnergy Advisors went to great lengths to detail a marketing/advertising disclaimer to inform the public that it is a separate entity from the EDUs, the EDUs do not directly address this issue in their supplemental comments. The EDUs likely chose not to address the issue because use of the disclaimer actually supports that the disclaimer actually violates the law.

Disclaimers are required by O.A.C. 4901:1-21-05(C)(8)(g) in advertising and marketing materials to disclose when a CRES is affiliated with an EDU. The intent of this rule is to ensure that consumers do not believe that the CRES is the same entity as the legacy EDU. However, the corporate separation rules require that an EDU cannot endorse a CRES provider or "indicate" that a CRES provider is an affiliate. O.A.C. 4901:1-37-04(D)(7). The use of a disclaimer does not satisfy this absolute prohibition contained in corporate separation rules. It does nothing to address the independent auditor's concern that use of the FirstEnergy brand gives an affiliated CRES an unfair preference.

By using the "FirstEnergy" name, FirstEnergy Advisors is deliberately promoting its relationship with the EDUs in violation of both rules. Consider FirstEnergy Advisors' logo, which gives prominence the to the "FirstEnergy" name.

The logo is unfair, misleading and deceptive under O.A.C. 4901:1-21-05(C) and 4901:1-37-04(D)(8). Indeed, FirstEnergy Advisors actively promotes its relationship with the EDUs on its website's "frequently asked questions:"[26]

> **Q. How is FirstEnergy Advisors related to FirstEnergy Corp.?**
>
> A. FirstEnergy Advisors is an unregulated subsidiary of FirstEnergy Corp. and an affiliate of FirstEnergy Corp.'s utilities in Ohio, Pennsylvania, New Jersey, Maryland and West Virginia.

Although the rules cited above are intended to separate a CRES from the market power of its affiliated EDU, FirstEnergy Advisors is using the "FirstEnergy" name to promote that relationship. The Commission should not allow it.

As NOPEC indicated in its reply comments filed in this proceeding on January 7, 2019, the Commission should follow the lead of the Public Utility Commission of Texas, which denied shared use of the AEP name and logo. See, *AEP Texas Commercial & Indus. Retail Ltd. Partnership v. Pub. Util. Com'n of Texas*, 436 S.W.3d 890, 923-924 (Tex. App. 2014). Further, as pointed out in OCC's comments,[27] the State of Illinois has followed suit, and has promulgated a rule that precludes an affiliated retail electric supplier from using the name or logo of the public utility.[28]

The Illinois rule is significant because it grandfathers the shared use of names/logos in effect prior to 2016. This Commission's concern in the Certification Case was that it had

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[26] https://www.firstenergyadvisors.com/firstenergyadvisors/faq.html

[27] OCC Supplemental Comments at 4.

[28] See, 83 Illinois Admin. Code §412.105: " 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."

allowed the practice of sharing names/logos with respect to other EDUs and their affiliates.[29] However, as Vistra notes, permission was granted in those proceedings prior to O.A.C. 4901:1-37-04(D)(7) and(9) becoming effective.[30] The Illinois rule supports that this Commission can, and should, end this practice that permits EDUs, and their holding companies, to give a preference to affiliated CRES providers. The practice violates O.A.C. 491:1-37-04(D)(7) and (9).

III. CONCLUSION

NOPEC respectfully submits that the weight of the comments offered in this proceeding require that FirstEnergy Advisors immediately cease using the FirstEnergy name and the EDUs and FirstEnergy Advisor immediately separate their management teams. At a minimum, the Commission should order that a hearing be held in this proceeding, or a rehearing held in the Certification Case, to address these issues, with sufficient time for discovery.

Respectfully submitted,

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[29] Certification Case, Finding and Order (April 22, 2020) at 6.

[30] Vistra Supplemental Comments at 13.

CERTIFICATE OF SERVICE

In accordance with O.A.C. 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing Supplemental Reply Comments was sent by, or on behalf of, the undersigned counsel to the following parties of record this 15th day of June 2020.

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Summary: Text Northeast Ohio Public Energy Council's Supplemental Reply Comments electronically filed by Teresa Orahood on behalf of Glenn S. Krassen