BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of The Northeast Ohio Public Energy Council for a Commission-Ordered Investigation, Rule Changes, a Requirement for FirstEnergy Corp. and its Subsidiaries to Show Cause Why They are not in Violation of Affiliate Relationship Regulations, and Other Relief.	)	Case No. 03-2038-EL-UNC

FINDING AND ORDER

The Commission finds:

(1) On October 1, 2003, The Northeast Ohio Public Energy Council (NOPEC) filed a petition with the Commission. NOPEC is a certified governmental aggregator of gas and electric supplies. NOPEC's petition alleges that it has experienced multiple instances of anti-competitive behavior by FirstEnergy's competitive retail electric service (CRES) affiliate, FirstEnergy Solutions (FES). NOPEC lists six areas of anti-competitive activities and requests stricter regulations. Those alleged market abuses are:

(a) FES has agreements with FirstEnergy that allow FES to purchase FirstEnergy's native generation supplies (firm supplies), but no other CRES provider has been offered the opportunity to make similar contracts. Furthermore, NOPEC argues that, since the generation supplies are managed by an unregulated FirstEnergy company and FES is an unregulated CRES provider, there is no direct Commission oversight of the transactions and FES has a *per se* unfair advantage. Also, NOPEC alleges that the current corporate separation rules allow FES' purchased power costs to possibly be subsidized by ratepayers.

(b) Two advertisements that use the logo "FirstEnergy" inappropriately provide free advertising for FES while other CRES suppliers have to spend substantial dollars to accomplish such publicity.[1]

(c) Several FirstEnergy personnel have contributed to political campaigns for public officers who were deciding upon a CRES provider.

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1 NOPEC alleges that the Commission promised to address joint advertising in June 2000. *In the Matter of the Commission's Promulgation of Rules for Minimum Competitive Retail Electric Service Standards Pursuant to Chapter 4928, Revised Code,* Case No. 99-1611-EL-ORD, Entry on Rehearing at 4 (June 8, 2000). NOPEC states that the Commission has not yet done so.

(d) FES got preferences because of FirstEnergy's ability to provide grants (and other assistance) to local governments.

(e) FirstEnergy employees are improperly disclosing proprietary competitor information to the advantage of FES and are not clearly distinguishing the separation between the electric distribution company and the competitive affiliate.

(f) Functional separation among FirstEnergy's nongeneration competitive lines of businesses allows market abuses to occur, as evidenced by examples cited in the petition.

(2) NOPEC claims that, with the end of the competitive market development period nearing, it is important to have effective controls in place to prevent abuses. NOPEC asks the Commission for:

(a) An investigation into the scope and adequacy of the current administrative rules governing the conduct between the electric distribution utilities and CRES provider affiliates, particularly the corporate separation rules and code of conduct.

(b) An investigation of FirstEnergy and FES to show cause why they are not in violation of the affiliate relationship regulations.

NOPEC suggests six specific revisions to the code of conduct. Additionally, NOPEC suggests that functional separation among FirstEnergy's nongeneration competitive lines of businesses end December 31, 2004, except for ownership of generating assets subject to existing financing arrangements (which should be structurally and legally separated by December 31, 2005).

(3) On January 23 and February 12, 2004, the Ohio Consumers' Counsel (OCC) and St. Charles Mercy Hospital (St. Charles) filed motions to intervene in this proceeding. OCC states that the interests of residential electric customers in the FirstEnergy service area are affected by this proceeding and OCC seeks to alleviate impediments to electric choice. St. Charles states that, as a customer of FES and Toledo Edison Company, it can provide insight into the adequacy of the code of conduct and its impact on electric competition in the FirstEnergy service territory.

Also, on February 27, 2004, the cities of Maumee, Northwood, Oregon, Perrysburg, Sylvania, Toledo, the Village of Holland and the Board of Lucas County Commissioners (Northwest Ohio Aggregation Coalition) jointly filed a motion to intervene in this proceeding. The Northwest Ohio Aggregation Coalition states that they operate governmental aggregation programs in Toledo Edison's service territory and have contracts with FES. As a result, these communities argue that they have a vital interest in exploring anticompetitive dealings between FirstEnergy and FES and protecting customers from violations of the corporate separation rules and code of conduct.

(4) No one filed a response to these motions to intervene.

(5) Upon review and consideration of the petition, we conclude that Commission investigations of the nature requested by NOPEC in its petition are not necessary for several reasons. First, the Commission recently has opened a docket (*In the Matter of the Commission's Review of Chapter 4901:1-20, Ohio Administrative Code,* Case No. 04-48-EL-ORD), in which we will consider all electric transition plan and consumer education rules, including the corporate separation rules and code of conduct requirements. This rule review is required by Section 119.032, Revised Code, and, therefore, we feel there is no need to evaluate part of Chapter 4901:1-20, Ohio Administrative Code, in this docket and conduct a review of all or the other part of that chapter in another docket.[2] NOPEC is free to participate in that proceeding and raise its issues therein.

As for NOPEC's allegation of specific market abuses and violations of current requirements by FirstEnergy and FES, the appropriate avenue to follow is for NOPEC to raise those allegations with the Commission in a complaint.

NOPEC has also expressed concerns with the FirstEnergy corporate separation plan approved by the Commission in *In the Matter of the FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues,* Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA and 99-1214-EL-AAM (July 19, 2000). We note that, as part of FirstEnergy's pending proposed rate stabilization plan, FirstEnergy has requested an extension of its interim corporate separation plan beyond 2005. *In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period,* Case No. 03-2144-EL-ATA. NOPEC is among the participants in that proceeding. The Commission will be considering the timing of functional and structural separation for FirstEnergy (and other issues) in that

2 Section 119.032, Revised Code, requires all state agencies to conduct a review of each of its rules at least every five years. The electric transition plan and consumer education rules, including the corporate separation rules and code of conduct requirements, were effective on March 10, 2000.

proceeding. In fact, the evidentiary hearing was just recently completed. We are not convinced that another proceeding is needed to again evaluate the time frames under which function and structural separation of the business units must be accomplished.

We conclude that other activities taking place already at the Commission suffice to address many of the issues that NOPEC has raised in this petition. Moreover, the other issues raised by NOPEC can be appropriately raised in a complaint proceeding. For these reasons, we conclude that the petition should be dismissed and this case closed of record. Since we are dismissing the petition, we will also deny the motions to intervene filed by OCC, St. Charles, and the Northwest Ohio Aggregation Coalition in this proceeding.

It is, therefore,

ORDERED, That NOPEC's October 1, 2003 petition is dismissed and Case No. 03-2038-EL-UNC is closed of record. It is, further,

ORDERED, That the motions to intervene filed by OCC, St. Charles, and the Northwest Ohio Aggregation Coalition in this proceeding are denied. It is, further,

ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

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Reneé J. Jenkins
Secretary