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March 27, 2012

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: *Revisions to Code of Conduct at 52 Pa. Code § 54.122*,
Docket No. L-2010-2160942

Dear Secretary Chiavetta:

On behalf of FirstEnergy Solutions Corp., I have enclosed the *Comments of FirstEnergy Solutions Corp. on Proposed Rulemaking Order* for filing in the above-captioned matter.

Very truly yours,

Brian J. Knipe
For BUCHANAN INGERSOLL & ROONEY, P.C.

BJK/kra

Enclosures

cc: Aspassia V. Staevska, Esq., Law Bureau

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Revisions to Code of Conduct at 52 Pa. Code § 54.122	:	Docket No. L-2010-2160942

COMMENTS OF FIRSTENERGY SOLUTIONS CORP.
ON PROPOSED RULEMAKING ORDER

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Dated: March 27, 2012

TABLE OF CONTENTS

I. INTRODUCTION

FirstEnergy Solutions Corp. ("FES") respectfully submits these Comments in response to the Proposed Rulemaking Order ("Order") entered by the Pennsylvania Public Utility Commission ("Commission") on August 25, 2011. FES, a subsidiary of FirstEnergy Corp., offers wholesale and retail energy and related products to customers located primarily in the Mid-Atlantic and Midwest regions. FES is a licensed Electric Generation Supplier ("EGS") in Pennsylvania, having been authorized at Docket No. A-110078 to serve all categories of retail customers throughout the Commonwealth.

The Commission's existing electric distribution company ("EDC") Code of Conduct[1] has served Pennsylvania well and ensures a properly functioning competitive retail electric market in Pennsylvania, though reasonable updates may be appropriate to reflect developments since the Code of Conduct became effective in July 2000. Consistent with the need for appropriate updates, FES supports the Commission's proposed revisions to 52 Pa. Code § 54.122(2)(i).

However, FES strongly urges the Commission to reject many of the proposed revisions as particularly burdensome, unnecessary, unconstitutional and otherwise beyond the Commission's authority to implement. These include the proposed EGS name restrictions, the proposed functional separation rule, and the proposed rule governing separation of facilities. Pennsylvania's retail electric markets have developed and expanded for over a decade, particularly in recent years since the end of rate caps, without evidence of the need for new burdensome restrictions, which are unnecessary in order for the competitive retail electric market to continue functioning properly, and in fact if implemented may result in higher retail prices for consumers or drive certain EGSs out of the retail business in the Commonwealth altogether, solely because they have affiliated Pennsylvania EDCs. The proposed rules will also confer a

[1] 52 Pa. Code § 54.122.

competitive benefit on certain EGSs. EGSs with no affiliated Pennsylvania EDCs, including those who are subsidiaries of far larger parent companies than that of FES,[2] will be able to take unfettered advantage of their parents' resources, while EGSs with Pennsylvania EDC affiliates would be required to operate as essentially independent businesses with completely separate staffing and facilities even if they are already in full compliance with other federal and state jurisdictional rules.

In the proposed rulemaking, the Commission proposes to impose on FES and other suppliers new rules that are draconian compared to current requirements, and are not in place in any other jurisdiction in which it operates.[3] Notwithstanding the Commission's responses to the Independent Regulatory Review Commission's ("IRRC") Regulatory Analysis Form submitted in support of the proposed regulations on January 27, 2012, FES has found no other state with rules nearly as burdensome as those the Commission is proposing herein. These proposed rules will impose extremely costly restrictions on FES without any evidence that such restrictions are necessary or beneficial for the protection of Pennsylvania customers. In addition, several of the new rules that restrict the trade name that can be used by the EGS, limit the use of employees and separate the office and building facilities used could be considered end runs of the explicit statutory prohibition in the Public Utility Code that bars the Commission from ordering the electric utility to "divest itself of facilities or to reorganize its corporate structure."[4]

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[2] For example, Direct Energy Services, LLC ("Direct Energy") is a subsidiary of Centrica PLC, a global energy company based in Great Britain with over 30 million customers in the UK and North America and 2011 operating revenues of approximately $36 billion (£22.8 billion). Of that amount, Direct Energy contributed approximately $9.7 billion (£6.1 billion); Direct Energy is the largest residential energy retailer in North America. *Source* www.centrica.com.

[3] In addition to Pennsylvania, FES operates in Illinois, Maryland, Michigan, New Jersey and Ohio and is subject to Federal Energy Regulatory Commission rules as a market-based rate tariff holder.

[4] 66 Pa.C.S. § 2804(5).

Throughout the Commission's ongoing Retail Markets Investigation ("RMI")[5] and associated proceedings, in which FES has actively participated by filing Comments and participating in *en banc* hearings and working groups, the Commission has stated that its goal is to ensure a properly functioning and workably competitive retail market in the Commonwealth. If the proposed regulations are implemented they will unquestionably result in higher retail prices for consumers and reduce competition among suppliers, by drastically increasing some suppliers' costs of providing retail service due to the cost of complying with the regulations, or driving adversely affected EGSs out of the retail business in the Commonwealth altogether, solely because they have affiliated Pennsylvania EDCs. This result is obviously contrary to the Commission's intent in the RMI and the stated purpose of the Pennsylvania Electricity Generation Customer Choice and Competition Act ("Competition Act").[6]

As explained in detail below, some of the Commission's proposed new restrictions are not only bad policy, but are also unconstitutional and beyond the Commission's jurisdiction under the Code,[7] as amended by the Competition Act. Further, they are legally deficient since they lack any support of an evidentiary record, or support from any comments filed in response to the Commission's Advance Notice of Proposed Rulemaking Order ("ANOPR").[8]

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[5] Docket No. I-2011-2237952
[6] 66 Pa.C.S. §§ 2801-2815.
[7] 66 Pa.C.S. §§ 101 *et. seq.*
[8] *Advance Notice of Proposed Rulemaking for Revision of Electric Distribution Company Code of Conduct at 52 Pa. Code § 54.122*, Docket No. L-2010-2160942 (Advance Notice of Proposed Rulemaking Order entered March 18, 2010) at 3.

II. COMMENTS

A. The Proposed Revisions to 52 Pa. Code § 54.122(2) Are Appropriate

FES supports the adoption of the proposed revisions to 52 Pa.Code §54.122(2). Subsection (2) retains some currently effective provisions, but adds new provisions concerning information EDCs are to provide consumers in response to requests for information about EGSs. The revised provisions provide EDCs with straightforward guidance as to the appropriate information to be given to consumers, and protects consumers by assuring that they receive accurate and unbiased information about retail choice. FES believes the proposed changes continue the Commission's laudable goal of promoting retail competition in Pennsylvania. The proposed revisions promote competition in a fair and equitable manner to all EGSs in the Commonwealth.

B. The Commission Should Reject Any Requirement That an EGS Change Its Name

The Commission's existing Code of Conduct requires an EDC's affiliated EGS which markets or communicates to the public using the EDC's name, or advertises or communicates through electronic medium to the public using the EDC's name, to include a disclaimer:

> 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.[9]

Section 54.122(3)(v) of the proposed Code of Conduct would go much farther, by prohibiting EGSs from having the same or a substantially similar name or fictitious name as the EDC or its corporate parent:

> (v) An electric generation supplier may not have the same or substantially similar name or fictitious name as the electric distribution company or its corporate parent. An electric generation supplier shall be granted 6 months from the effective date of this regulation to change its name.[10]

As explained in detail below, the restriction proposed in the above-quoted regulation is bad policy that has not been adopted by any other jurisdictional authority cited in the Order.[11] Second, the restriction would violate FES' rights under the First and Fifth Amendments of the United States Constitution and its corresponding rights under Pennsylvania's Constitution. Third, there is no authority under the Pennsylvania Public Utility Code for the Commission to force an EGS to change its name in order to participate in Pennsylvania's retail electric market. Finally, FES notes that the name restriction in proposed Section 54.122(3)(v) conflicts with the immediately preceding provision in proposed Section 54.122(3)(iv). For the numerous reasons stated above, and further discussed below, the Commission should eliminate Section 54.122(3)(v) entirely from its proposed regulations.

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[9] 52 Pa. Code § 54.122(10).

[10] Order, Annex A at 9 (Proposed 52 Pa. Code § 54.122(3)(v)). While the first "its" in this paragraph could refer to either the EGS or EDC, FES presumes that "its" refers to the EDC.

[11] The Commission listed in its Regulatory Analysis Form to the Independent Regulatory Review Commission eleven states as having similar provisions in its Code of Conduct However, none of the eleven states listed by the Commission prohibit the use of a name similar to a corporate parent's name even if it is dissimilar from that of the affiliated EDC. The majority of the states listed by the Commission have similar provisions in their Codes of Conduct that Pennsylvania currently has regarding electric distribution companies and their affiliates sharing similar names, logos, or trademarks.

1. The Name Change Requirement Should be Rejected as Bad Policy

Section 54.122(3)(v) of the proposed Code of Conduct would require EGSs with affiliated Pennsylvania EDCs such as FES, and possibly ConEd Solutions, Inc., Duquesne Light Energy, Exelon Energy Company and PPL EnergyPlus LLC to change their names if they wish to continue offering competitive retail service in Pennsylvania. FES has been licensed to operate as an EGS in Pennsylvania since 1998[12]. Its name is in no way similar to the names of its affiliated EDCs (Metropolitan Edison Company, or "MetEd"; Pennsylvania Electric Company or "Penelec"; Pennsylvania Power Company or "PennPower"; and West Penn Power Company or "West Penn"). However, FES is affected by this restriction because the name change requirement inexplicably also prohibits it from using a name that is substantially similar to that of its corporate parent, FirstEnergy Corp.

While the Commission notes in its Order that "this requirement varies in different jurisdictions," *Proposed Rulemaking*, p. 7, none of the several states that the Commission presumably considered in developing its proposed Code of Conduct revisions, including Texas,[13]have any such naming restriction. Further, the FERC Standards of Conduct contain no such restriction in order for entities to qualify as wholesale electricity providers under its market-based rate rules. The unwillingness of other state and federal regulatory agencies to attempt to implement such a regulation is understandable, as it is unsustainable for many legal reasons

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[12] Docket No. A-110078 (1998).

[13] FES notes that Direct Energy is aggressively pursuing the same naming restriction strategy in Texas, taking the opportunity of a recent filing by AEP's retail marketing company to argue that it should be prohibited from using "AEP" in its name even though the company has been operating in the state under that name since 2001. Texas law does not contain such a naming prohibition, but Direct Energy is arguing that such use constitutes a "deceptive, misleading, vague" or otherwise illegal use of the AEP name under Texas law since distribution company affiliates operating in Texas also use "AEP" as part of their names. *Application of AEP Texas Commercial & Industrial Retail Limited Partnership for Amendment to a Retail Electric Provider Certification*, Public Utility Commission of Texas, Docket No. 39509. The case went to a hearing in February, 2012 but has not been decided as of the date these Comments are filed.

described below. In addition to the numerous legal reasons this restriction is insupportable, it is, as well, simply bad policy.

Section 2811(e) of the Competition Act[14] requires that the Commission "ensure that a properly functioning and workable competitive retail electricity market exists in the state".[15] In its July 28, 2011 Opinion and Order in the RMI, the Commission approvingly cited the following standard for evaluating competition in a retail market:

1. Participation in the market by many sellers so that an individual seller is not able to influence significantly the price of the commodity.
2. Participation in the market by many buyers.
3. Lack of substantial barriers to supplier entry and participation in the market.
4. Lack of substantial barriers that may discourage customer participation in the market.
5. Sellers are offering buyers a variety of products and services.[16]

The seller restrictions in the proposed rules would work to discourage rather than enhance the attainment of these goals. As described further in these Comments, requiring an EGS to change its well-established name would so severely harm that EGS, and put it at such an unfair competitive disadvantage, that the proposed requirement actually *conflicts* with the Commission's obligation to ensure a functioning and workably competitive retail electricity market.

In addition, the requirement that an EGS conceal its affiliation with an EDC runs counter to the obligation to provide customers with adequate and accurate information to enable them to make informed choices regarding the purchase of electricity services.[17] In fact, in Interim

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[14] 66 Pa.C.S. § 2811.
[15] *Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952 (April 29, 2011), p. 2.
[16] *Investigation of Pennsylvania's Retail Electricity Market,* Docket No. I-2011-2237952 (July 28, 2011), p. 4, fn 3; FES notes that the cited text was developed in the context of natural gas competition. However, the Commission's current Standard of Conduct for natural gas distribution companies and natural gas suppliers allows the utility and the competitive supplier to allocate the costs of general administration and support services. In addition, the affiliated competitive supplier may use the utility's name or logo provided a disclaimer is utilized.
[17] 66 Pa.C.S. § 2807(d)(2).

Guidelines the Commission issued in 1998 in connection with EGS operational changes affecting customer service and contracts, the Commission expressed concern about potential customer confusion caused by an EGS changing its name.[18]

The unreasonable prohibition on the use of names that suppliers have used for years, and are permitted to use in other jurisdictions in which they do business, could result in suppliers leaving Pennsylvania altogether rather than go to the enormous expense of complying with this rule for only one state. For affected suppliers that do change their names in order to continue participating in the Pennsylvania market, the extra costs involved in maintaining this separate corporate identity (along with the additional costs of separate staffing and facilities addressed elsewhere in these comments) will unnecessarily result in higher retail pricing for customers.

2. Restrictions on the Use of Names Constitute Unlawful Infringement of Commercial Speech

Section 54.122(3)(v) of the proposed Code of Conduct would violate the right of affected EGSs to free speech under the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. Trade names have long been recognized as constitutionally protected commercial speech because they serve to identify a business entity and convey important information about its type, price and quality of service.[19] Courts hearing a First Amendment challenge to a regulation of commercial speech will apply an "intermediate" level of scrutiny to the regulation, through a four-pronged test.[20] That is, (1) the expression must be protected by the First Amendment, (2) the asserted governmental interest must be substantial, (3) the regulation must directly advance the governmental interest asserted, and (4) the regulation

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[18] *Interim Guidelines Regarding Notification by an Electric Generation Supplier of Operational Changes Affecting Customer Service and Contracts*, Docket No. M-00960890F.0013 (August 14, 1998), p. 9.
[19] *Friedman v. Rogers*, 440 U.S. 1 (1979),
[20] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980) ("*Central Hudson*").

must be no more extensive than necessary to serve the interest.[21] The proposed restriction would fail this test, and is therefore unconstitutional.

With respect to the first prong, a trade name is protected by the First Amendment if it is lawful and not misleading.[22] Even assuming, for the sake of argument, that FES had a name similar to any of its affiliated EDCs (which it does not), there is nothing unlawful or misleading about using an affiliated utility's or corporate parent's name. To the contrary, an EGS's use of its affiliated utility's or corporate parent's brand name conveys truthful information to consumers. Current Commission rules require the use of a reasonable disclaimer if an EGS uses its affiliated EDC's name or logo when it markets of communicates to the public,[23] which is a reasonable protection against any possible customer confusion. Truthful claims of an EGS's affiliation with a utility, or its parent, are indisputably lawful and consistent with customers' right to adequate and accurate information to enable them to make informed choices regarding the purchase of electricity services.[24] Rather, it is the *concealment* of an EGS's affiliation with the EDC or its parent that is misleading.

With respect to the second prong, that the asserted governmental interest must be substantial, the Commission articulated four substantial governmental interests advanced by the Code of Conduct in its ANOPR commencing these proceedings:

1. To assure the provision of direct access on equal and nondiscriminatory terms;
2. To prevent cross subsidization between EDCs and their affiliated suppliers;
3. To prohibit unfair or deceptive practices by suppliers; and

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[21] *Central Hudson*, 447 U.S. at 565-66.
[22] *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004).
[23] 52 Pa. Code § 54.122(10). Notably, the current rules do not contain a similar disclaimer requirement if the EGS uses the name of its corporate parent in marketing or communication, which leads to the conclusion that use of the corporate parent's name is not likely to confuse customers, particularly if the affiliated EDC's name is dissimilar to the corporate parent's as in FES' case.
[24] 66 Pa.C.S. § 2807(d)(2).

4. To establish and maintain an effective and vibrant competitive market in the purchase and sale of retail electric energy in Pennsylvania.[25]

FES agrees that these are substantial governmental interests that the Commission is serving through its reasonable, appropriately crafted existing Code of Conduct. The proposed rulemaking, on the other hand, contains no analysis that the current Code of Conduct is inadequate, nor that the draconian rules proposed in this rulemaking are necessary, to satisfy the above-listed interests.

Absent such analysis, the proposed restriction cannot possibly satisfy the third prong of the constitutional test that requires regulation to directly advance any of these governmental interests. To satisfy this prong, there must be a demonstration that the harms the government recites are real and that its restriction will in fact alleviate them to a material degree.[26] There has been, and can be, no demonstration that any asserted harms caused by an EGS' use of a name similar to that of an affiliated EDC or its corporate parent (*e.g.*, deception of customers, or frustration of the development of a competitive retail electric market) are real, since the Commission has not studied or engaged in fact finding on this matter. FES is not aware of any credible complaints that the use of its name has adversely impacted the competitive retail electricity market or another market participant by giving FES an unfair competitive advantage, or caused customer confusion. Pennsylvania's competitive retail electric markets have continually developed over the last decade, without the proposed restriction. Indeed, contrary to the Commission's intentions, requiring FES to change its name will negate the good will FES has worked years to build through providing substantial savings to its retail customers, and give its equally established competitors that are unaffected by the proposed revision an unfair competitive advantage. Likewise, there has been no demonstration that the proposed restriction

[25] ANOPR at 1.
[26] *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173 (1999).

would alleviate any claimed harms. The third prong of the constitutional test is not satisfied by "mere speculation and conjecture by the government as to the effectiveness of the restriction."[27]

Nor is the restriction consistent with the fourth prong, since it is far more intrusive than necessary to serve the asserted interest. This prong demands a "reasonable fit" between the government's goals and the means chosen to accomplish those goals; in other words, it requires narrow tailoring.[28] There is no reasonable fit between the laudable goals of preventing customer confusion, or developing a competitive retail electricity market, and the proposed prohibition against an EGS using a name similar to its corporate parent even if the EGS' name is dissimilar to that of any affiliated EDC. Moreover, assuming for the sake of argument that some credible competitive concerns are later documented, there are other, less burdensome ways to address such concerns. For this very reason, the Commission rejected a previous recommendation to adopt a similar prohibition in the initial Code of Conduct, explaining its preference for more narrowly tailored methods of achieving these goals, such as customer education and disclaimers:

> Enron encourages us to prohibit an electric distribution company-affiliated generation supplier from using the utility name or logo . . . . Again, we are unwilling to flatly prohibit use of utility name or logo. While it may be that there is some initial customer confusion concerning retail competition and the role of utilities, their affiliates and competitors, we have adopted a strong and ongoing customer education program that we believe has been successful in acquainting the people of this Commonwealth with their retail options. This Commonwealth continues to have one of the highest retail electric generation shopping rates in the Nation. However, we do accept Enron's suggestion that we include disclosure language such as that adopted in the PECO settlement and have modified paragraph (10) accordingly.[29]

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[27] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).
[28] *Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004).
[29] *Competitive Safeguards for the Electric Industry*, Docket No. L-980132 (Final Rulemaking Order entered April 28, 2000).

Customer education programs and disclaimers do not restrain protected commercial speech in violation of the First Amendment and, when combined with federal and state laws prohibiting fraudulent or deceptive advertising, provide ample protection for consumers and competition. In contrast, the proposed restriction in the Code of Conduct is far more extensive than necessary to address any concerns about alleged consumer confusion or speculative impacts on the operation of Pennsylvania's competitive retail electricity market. Therefore, the proposed restriction would not survive a challenge under the First Amendment.

Because the proposed name restriction violates the First Amendment of the United States Constitution, it also violates the free speech guarantees of Article I, Section 7 of the Pennsylvania Constitution. Article I, Section 7 actually predates the related federal First Amendment guarantee, and provides broader protections of expression in a number of different contexts, including commercial speech.[30] To satisfy Article I, Section 7, the proposed restriction would have to withstand "strict scrutiny."[31] That is, it would have to be narrowly drawn to accomplish a compelling governmental interest,[32] a test that is significantly more stringent than the First Amendment's "reasonable fit" requirement. As explained earlier, there are far less intrusive, practicable methods available to effect the Commission's interests, such as the currently effective Code of Conduct.

Because it would violate EGSs' rights to free speech under the United States and Pennsylvania Constitutions, the proposed name restriction should be rejected.

3. The Proposed Ban on EGS' Use of Names Is an Invalid *Ultra Vires* Action

The proposed restriction on an EGS' use of its affiliates' names should also be rejected because it exceeds the Commission's jurisdiction. It is well-settled that administrative agencies,

[30] *See DePaul v. Commonwealth*, 600 Pa. 573, 589-90, 969 A.2d 536, 546 (Pa. 2009).
[31] *See DePaul*, 600 Pa. at 590, 969 A.2d at 546.
[32] *See DePaul*, 600 Pa. at 596, 969 A.2d 546, 550.

such as the Commission, are creatures of legislation and can only exercise the powers that are specifically conferred upon them by statute.[33] The Commission acts *ultra vires* when it acts either without statutory authority or contrary to statutory authority.[34] The Commission's general authority to promulgate regulations is similarly limited. It "may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties."[35] With respect to EGSs, the Commission's powers and duties are explicitly limited by Section 2802(14) of the Competition Act, which provides that the "generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter."[36] The Competition Act limits the Commission's jurisdiction over EGSs to licensing authority[37], rather than public utility regulation. Given the statutory limitation in the Public Utility Code on the Commission's authority to reorganize an EGS' corporate structure, the authority of the Commission to prohibit corporate names is suspect.[38]

If adopted, the blanket prohibition in proposed Section 54.122(3)(v) against a licensed EGS having the same or a substantially similar name as an EDC or its corporate parent would exceed the limits of the Commission's statutory authority. The excessive reach of the proposed revisions is illustrated particularly well in the case of FES, an EGS whose name bears no

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[33] *Small v. Horn*, 554 Pa. 600, 609, 772 A.2d 664, 669 (1998); *Grimaud v. Pennsylvania Insurance Department*, 995 A.2d 391, 405 (Pa. Cmwlth. Ct. 2010); *see Feingold v. Bell*, 477 Pa. 1, 8, 383 A.2d 791, 795 (1977) ("Since the PUC is a creature of statute, it has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.").

[34] *Grimaud*, 995 A.2d at 405.

[35] 66 Pa.C.S. § 501(b). For example, the Competition Act directs the Commission to establish regulations requiring EGSs and EDCs to provide accurate and adequate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider, 66 Pa.C.S. § 2807(d)(2), and in regulating the service of EGSs, to impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, 66 Pa.C.S. § 2809(e).

[36] 66 Pa.C.S. § 2802(14).

[37] 66 Pa.C.S. § 2809.

[38] 66 Pa.C.S. §2804(5).

similarity to those of its affiliated EDCs but may be impacted nonetheless because its name is similar to the name of its ultimate parent, FirstEnergy Corp.

As described above, the Commission's regulations must fall within the power delegated to the Commission by statute and the Commission cannot lawfully issue regulations that extend beyond the limits of its statutory authority. While the Commission clearly has broad authority with respect to EGS licensing[39], nothing in the Public Utility Code suggests that the Commission's authority extends to an ability to mandate the form of EGS name for an applicant who is otherwise qualified, or to force FES (or any other EGS) already licensed by the Commission to change its name years after its original licensing.

4. The Proposed Name Restrictions Would Constitute an Unlawful Taking of Private Property Without Just Compensation

The proposed requirement that an EGS change its name would also amount to an unconstitutional taking of private property without just compensation, under the Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and Article 1, Section 10 of the Pennsylvania Constitution. The courts have recognized that businesses have property interests in their names,[40] and that intangible property can be the subject of a takings claim.[41] FES has a significant property interest in preserving its ability to use the name and the associated goodwill it has developed in the competitive retail and wholesale electricity markets, with customers, vendors and the public generally.

In determining whether the taking of a property interest has occurred for which compensation is due, courts apply a multi-factor test: "Primary among those factors are the

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[39] *See, e.g.*, 66 Pa.C.S. § 2802, 66 Pa.C.S. § 2809(b).
[40] *See, e.g., Joseph Scott Co. v. Scott Swimming Pools, Inc.*, 764 F.2d 62, 67 (2d Cir. 1985).
[41] *See, e.g., Horne v. U.S. Department of Agriculture*, No. 10-15270, 2011 WL 2988902, at *6 (9th Cir. July 25, 2011); *Gen. Category Scallop Fishermen v. Sec'y of U.S. Dep't of Commerce*, 720 F. Supp. 2d 564, 576 (D.N.J. 2010).

economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as consideration of the "character of the governmental action."[42] Regulations that prevent an EGS like FES from using its corporate name effect a taking by depriving the EGS of all economically beneficial or productive use of its private property.[43] Nor will the "character" of the proposed regulation avoid a taking. The Commission has entirely failed to provide an evidentiary basis to justify its requirement that FES change its name. In fact, with respect to a potential taking, the Takings Clause "presupposes that the government has acted in pursuit of a public purpose" but requires compensation in the event of an otherwise proper interference.[44]

Therefore, even assuming the name restriction was enacted pursuant to the lawful exercise of the Commission's powers (which it would not be), FES and other EGSs would be entitled to just compensation.[45] The Commission does not have an unfettered ability to deprive FES and other EGSs of their property.[46] Because nothing in the Commission's proposed regulation provides for any compensation whatsoever to FES or other EGSs that may be affected, the proposed regulation, if adopted, will violate the Takings Clause.

5. There Is No Record Support for the Proposed Name Change Rule

No record has been developed in this proceeding justifying the extreme measure of forcing companies that have operated for years in Pennsylvania to change their names. Assuming, arguendo, that the Commission has the statutory authority to impose such a measure and it is otherwise legal, there is absolutely no factual basis established on the record for the

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[42] *Lingle v. Chevron*, 544 U.S. 528 (2005) at 538-39 (citing *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).
[43] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *see In re De Facto Condemnation and Taking of Lands of WBF Assocs., L.P. by Lehigh-Northampton Airport Auth.*, 588 Pa. 242, 254, 903 A.2d 1192, 1199 (2006); *Tobin v. Centre Twp.*, 954 A.2d 741, 747 (Pa. Commw. Ct. 2008).
[44] *Lingle*, 544 U.S. at 543.
[45] *Horne*, 2011 WL 2988902, at *5.
[46] *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003).

Commission to do so. FES submits that the existing Code of Conduct at Section 54.122(2)(ii), with the disclaimer requirement already in place, sufficiently protects the interests of Pennsylvania consumers[47], and the extreme remedy proposed by the Commission is unnecessary for that purpose.

C. The Commission Should Reject the Proposed Shared Employees Rule

The current Code of Conduct requires an EDC to insure that its employees function independently of an affiliated EGS:

> An electric distribution company which is related as an affiliate or division of an electric generation supplier or transmission supplier (meaning any public utility that owns, operates, or controls facilities used for the transmission of electric energy) which serves any portion of this Commonwealth; and any electric generation supplier which is related as an affiliate or division of any electric distribution company or transmission supplier which serves any portion of this Commonwealth, shall insure that its employes function independently of other related companies.[48]

The proposed revisions would go far beyond requiring independent functioning, and prohibit Pennsylvania EDCs and affiliated EGSs from sharing employees or services:

> An electric distribution company and affiliated electric generation supplier or transmission supplier may not share employees or services, except for corporate support services, emergency support services, or tariff services offered to all electric generation suppliers on a non-discriminatory basis. Temporary assignments of employees from an electric distribution company to an affiliated electric generation supplier or transmission supplier, for less than 1 year, shall be considered the same as sharing employees.
>
> (A) "Corporate support services" do not include purchasing of electric transmission facilities, service and wholesale market products, hedging and arbitrage, transmission and distribution service operations, system operations, engineering, billing, collection, customer

[47] 66 Pa.C.S. §2802.
[48] 52 Pa. Code §54.122(11).

> service, information systems, electronic data interchange, strategic management and planning, account management, regulatory services, legal services, lobbying, marketing or sales.[49]

It is a common practice in holding company systems to maximize efficiencies and control costs by sharing employees and services through a separate affiliated service company. By prohibiting the sharing of employees and services among Pennsylvania EDCs and their affiliated EGSs the proposed revision would end this practice for holding company systems with Pennsylvania EDCs and licensed EGSs. However, licensed EGSs within holding company systems that do not include a Pennsylvania EDC, or that have the support of corporate parents with no affiliated Pennsylvania EDCs, would be free to continue the practice of sharing employees and services. This proposal should be rejected because it represents bad policy, lacks any basis in evidence, and constitutes an invalid *ultra vires* action.

1. The Proposed Prohibition Against Sharing Employees is Bad Policy

a) Rules in Other States Do Not Contain Similar Restrictions

The Commission's proposed prohibition against the sharing of "corporate support services" runs contrary to the regulations in other states which the Commission purportedly considered.[50] These states include Illinois, where the Illinois Commerce Commission's ("ICC") regulation generally prohibit electric utilities and their retail electric supplier affiliates from sharing employees, yet permit them to share "corporate support."[51] They also include New Jersey, where the Board of Public Utilities' ("BPU") regulations allow "shared services" among

[49] Order, Annex A at 10-11 (Proposed 52 Pa. Code § 54.122(4)(iii)(A)).

[50] According to the Commission's Regulatory Analysis Form to the IRRC, the Commission reviewed eleven states' Codes of Conduct. Eight of the eleven states allow an EDC to share employees for corporate support services. While Massachusetts and Maine do not specifically allow the employees of an EDC to be shared with its affiliate, the regulations allow those Commissions to provide an exemption to this rule. In only one of the eleven states, Michigan, is an EDC or alternative electric supplier and its affiliates or other entities within its corporate structure not allowed to share facilities, equipment, or operating employees; it is worth noting that Michigan's retail market is limited to a small fraction of electricity service in the state.

[51] See Ill. Admin. Code tit. 83, §§ 450.10 (defining "corporate support"), 450.110.

utilities and affiliates.[52] The ICC and BPU regulations contradict the Commission's proposed regulations, rather than support them.

Also, the Public Utilities Commission of Ohio has issued rules and Code of Conduct requirements addressing corporate separation and interaction between affiliated electric utilities and retail service providers.[53] Since FES operates in Ohio, FirstEnergy utilities and FES are subject to and are in full compliance with these rules.[54]

> 4901:1-37-04 General provisions.
>
> ...
>
> (3) Cross-subsidies between an electric utility and its affiliates are prohibited. An electric utility's operating employees and those of its affiliates shall function independently of each other.
>
> (4) An electric utility may not share employees and/or facilities with any affiliate, if the sharing, in any way, violates paragraph (D) of this rule [which contains detailed Code of Conduct requirements].
>
> (5) An electric utility shall ensure that all shared employees appropriately record and charge their time based on fully allocated costs.

The Ohio Commission's rules recognize the business realities of corporate operations and efficiencies, but also fully protect the consumers of that state without dismantling FES' corporate affiliations.

In addition, the Connecticut Department of Energy and Environmental Protection Public Utilities Regulatory Authority's Code of Conduct for Electric Distribution Companies allows an EDC, its parent holding company, or a separate affiliate created solely to perform corporate support services, to share with its generation entities or affiliates joint corporate oversight, governance, support systems, and personnel. Examples of services that may be shared include,

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[52] N.J. Admin. Code tit. 14, §14:4-3.2.

[53] *See, generally,* Chapter 4901:1-37, Ohio Administrative Code.

[54] As the Commission recognizes in the Order at p. 9, Ohio also requires the maintenance of a cost allocation manual, which the Commission also adopts.

but are not limited to: payroll; taxes; shareholder services, insurance, financial reporting; corporate financial planning and analysis, corporate accounting, corporate security, human resources, employee records, regulatory affairs, lobbying, legal, and pension management.[55]

Furthermore, New Hampshire's Public Utility Commission's affiliate transaction Rules allow a distribution company, its parent holding company, or an affiliate created solely to perform corporate support services, to share with its competitive affiliates joint corporate oversight, governance, support systems and personnel. Examples of services that may be shared include, but are not limited to[56]: payroll, taxes, shareholder services, insurance and risk management, information system and technology, materials management and procurement, internal auditing, budget administration, call center facilities, billing and payment processing, management and maintenance of affiliate-owned or leased vehicles and buildings, corporate financing, financial reporting, corporate financial planning and analysis, treasury services, corporate and strategic planning, corporate accounting, corporate security, human resources, employee records, regulatory affairs, lobbying, legal, engineering services other than utility system operations engineering, and pension management[57].

The Code of Conduct adopted by the Texas Public Utility Commission merely requires the implementation of adequate "safeguards" to prevent the transfer of information in a manner that would create a competitive advantage, result in preferential treatment or customer confusion, or encourage cross-subsidization. Where a utility has implemented such safeguards, it is permissible under the Texas Code of Conduct for it to share corporate support services, to

[55] 16-244h-5(f).
[56] See *fn* 69, *infra*.
[57] PUC 2105.04 and PUC 2105.05.

include common officers and directors and information systems, among other services, with its competitive affiliate.[58]

The Maryland Public Service Commission's Code of Conduct specifically allows a utility to share personnel with its affiliate.[59] Also, the Oregon Public Utility Commission's Code of Conduct does not prohibit a utility from sharing personnel with its affiliate.[60]

It is apparent from the above discussion that other states have not seen the need to adopt restrictions nearly as intrusive as those imposed in the Commission's proposed regulation §54.122(4)(iii)(A). For this reason, as well as the reasons set forth elsewhere in this section, the proposed regulation should not be adopted.

b) FERC Rules Do Not Contain Similar Restrictions

In addition to regulation by the states in which it operates, FES also holds a market-based rate tariff under rules promulgated by the Federal Energy Regulatory Commission ("FERC") as a wholesale service provider. FES and FES affiliates are subject to FERC Standards of Conduct[61], which govern the behavior of wholesale service providers, and any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce and conducts transmission transactions with an affiliate that engages in marketing functions (as defined in the Standard of Conduct regulations). In addition to the Standards of Conduct, FERC regulations contain Affiliate Rules[62] which govern the relationship between a FERC-jurisdictional public utility with captive customers and its market-regulated power sales affiliate(s). FES, as a market-based rate tariff holder, is required to comply with all applicable

[58] 16 TAC 25.272(d).
[59] COMAR Section 20.40.01.04.
[60] OAR 860-038-0500 to 860-038-0640
[61] 18 C.F.R. Part 358.
[62] 18 C.F.R. §35.39. *See also,* 18 C.F.R. §35.36(a)(5) and 18 C.F.R. §35.36(a)(6).

FERC rules, including the FERC's Standards of Conduct and Affiliate Rules. Violation of these rules constitutes a basis for revocation of a holder's market-based rate tariff.

The Commission should consider as instructive recent pronouncements by FERC on the issue of sharing employees in the context of its Standards of Conduct and Affiliate Rules. The current Standards of Conduct and Affiliate Rules reflect the FERC's experience with regulating the conduct of public utilities, transmission providers and their marketing affiliates since 1988 (when gas industry rules were first adopted) and 1996 (when electric industry rules were first adopted). Both the Standards of Conduct and the Affiliate Rules generally include similar types of rules governing behavior, including an independent functioning requirement, which will be discussed further below.

The Standards of Conduct codified in Part 358 of the FERC's regulations[63] were established through a series of orders at FERC Docket No. RM07-1 (the "Order 717 Series"). The purpose of the Standards of Conduct is to prevent marketing affiliates of transmission providers from obtaining non-public transmission function information and thus having a competitive advantage over non-affiliated marketing entities. The Standards of Conduct codify the FERC's decision to utilize an approach of separating by function transmission personnel from marketing personnel (the "employee functional approach") rather than the previously utilized "corporate separation approach," which the FERC found was "difficult for regulated entities to apply and for the Commission to enforce."[64] The FERC further found that the discarded corporate separation approach was "too complex to facilitate compliance...and ha[d] the unintended effect of making it more difficult for transmission providers to reasonably

[63] 18 C.F.R §§358.1-358.8.
[64] *Standards of Conduct for Transmission Providers*, Docket No. RM-7-01-000; Order No. 717 (October 16, 2008), at ¶ 1.

manage their businesses."[65] The employee functional approach set out in the Order 717 Series does not categorize employees by department such as Legal or Strategic Planning. Rather, the categorization is done through an individual employee's job requirements. Only employees whose job functions clearly categorize them as either "Transmission Function employees"[66] or "Marketing Function employees"[67] must be identified as such.[68] The Order 717 Series requires that Transmission Function employees and Marketing Function employees maintain independent operations and that non-public transmission information cannot be shared with marketing function personnel. In accordance with these rules, FirstEnergy maintains a list of employees who are in each category. The list is continuously updated and distributed throughout the company by email and posting on the FirstEnergy intranet portal. Employee training on the purposes and requirements of the Standards of Conduct is mandatory.

The FERC's Affiliate Rules at 18 C.F.R. §35.39(c) address the required separation of employees and information sharing between a public utility and a power sales affiliate. While the Standards of Conduct protect competition within the electric and natural gas industries, the Affiliate Rules govern the relationship between a franchised public utility with captive customers and its market-regulated power sales affiliate. Both sets of requirements generally include similar types of rules governing behavior, but the Affiliate Rules are aimed at protecting the captive customers of the public utility rather than the competitors of its marketing affiliate. The Affiliate Rules relevant to the issue of employee sharing are as follows:

(c) Separation of functions...

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[65] *Id.*, at ¶ 9.
[66] 18 C.F.R. §358.3(i).
[67] 18 C.F.R. §358.3(d).
[68] Employees who fall in neither category are subject to a 'no conduit' rule pursuant to which they are prohibited from disclosing non-public transmission function information to marketing function personnel.

> (2)(i) To the maximum extent practical[69], the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers.
>
> (ii) Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions.
> ...

Several orders have clarified the FERC's intent in regard to the shared employees rule. The FERC has made it clear that the rules apply on an employee-by-employee basis, depending on whether a particular employee is actively and personally engaged in either marketing or transmission functions[70] on a day-to-day basis. The FERC's affiliate rules also contain provisions governing the restriction of market information among public utilities and power sales affiliates, and permissibly shared employees, field and maintenance employees and senior officers and boards of directors.[71]

Violation of any of the above rules by a market-based rate tariff holder constitutes grounds for revocation by FERC of the company's market-based rate tariff authority.[72] As this Commission itself noted recently in the context of potential revocation of a Pennsylvania EGS license:

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[69] It should be noted that FERC adds some flexibility in what an affected company can and cannot do. In addition in the referenced language, many of the states include phrases such as "for example" or "not limited to" that gives the company some flexibility. The Commission's regulations do not permit such flexibility or recognize in any way that companies differ in their operations.
[70] 18 C.F.R. §§385.3(c) and (h), respectively.
[71] 18 C.F.R. §385.3(d) and (g).
[72] 18 C.F.R. §385.3(a).

> The power to put an entity out of business altogether... is certainly not inconsiderable.[73]

It should be apparent from the above that FES' obligations under the FERC Standards of Conduct and Affiliate Rules and the rules currently in effect in Pennsylvania and the other state jurisdictions in which FES operates are more than adequate to protect the interests of Pennsylvania consumers without forcing additional burdensome and costly restrictions on FES and similarly situated EGSs in the Commonwealth. This is particularly true since there is no evidence that the draconian remedies in the Commission's proposed regulations are needed.

2. The Proposed Prohibition Against Sharing Employees Is an Invalid *Ultra Vires* Action

Administrative agencies like the Commission may only exercise the powers that are expressly conferred upon them by statute.[74] As with the Commission's proposed name restriction, this proposed revision prohibiting the sharing of employees and services would exceed the Commission's statutory authority. Again, the Commission lacks the statutory authority to impose its regulations on entities and relationships over which it has no jurisdiction. While the Commission has jurisdiction over contracts and arrangements between a public utility and its shared service affiliate,[75] it has no jurisdiction over contracts and arrangements between a licensed EGS and its shared service affiliate. More specifically, nothing in the Code gives the Commission regulatory authority over FES' contractual arrangements with its service company affiliate, which employs the majority of FirstEnergy employees. The proposed prohibition would require the revision of such arrangements between EGSs and their service companies,

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[73] *Interim Guidelines For Eligible Customer Lists*, Docket No. M-2010-2183412, Order entered November 15, 2011 at 16.
[74] *See Small*, 554 Pa. 600, 609, 772 A.2d 664, 669 (1998); *Grimaud*, 995 A.2d 391, 405 (Pa. Cmwlth. Ct. 2010).
[75] 66 Pa.C.S. §§ 2101-2107.

contracts the Commission is powerless to revise or reform under Section 508 of the Code,[76] which applies only to public utility contracts. The proposed revisions to the Code of Conduct also contradict the Commission's previous recognition of the legitimacy of arrangements between EDCs and affiliated EGSs, through the granting of licenses to several affiliated suppliers.

Moreover, such a prohibition against sharing employees in connection with "corporate support services," if intepreted to preclude common strategic management of EDCs and EGSs at the parent level, could have the practical effect of compelling a parent holding company — which is not subject to Commission jurisdiction — to divest either its EDC or EGS subsidiaries. Accordingly, the proposed revision to the Code of Conduct cannot be reconciled with Section 2804(5) of the Code, which bars the Commission from engaging in corporate structure reorganizations.[77] Implementation of these new provisions would make affected EGSs less competitive, and put them at a severe competitive disadvantage against competitors with corporate parents free to finance their operations, in contravention of the Commission's obligation to ensure a properly functioning and workable competitive retail electricity market.[78]

D. <u>The Commission Should Reject the Proposed Separation of Facilities Rule</u>

The mandated physical separation of EDC and EGS office facilities is a new concept in the Commission's competitive safeguards rules. The proposed rule reads as follows:

> (ix) An electric distribution company and affiliated electric generation supplier may not share office space and shall be physically separated by occupying different buildings.[79]

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[76] 66 Pa.C.S. §508.
[77] 66 Pa.C.S. §2804(5).
[78] 66 Pa.C.S. §2811(e).
[79] Order, Annex A at 9 (Proposed 52 Pa. Code § 54.122(3)(ix)).

The sole justification given for this proposed rule is that "[t]his limitation is common in other jurisdictions."[80] The Order does not elaborate as to which jurisdictions the Commission refers. However, as explained below, this statement is incorrect.

For reasons similar to those addressed above concerning the Commission's proposed name and employee restrictions, the proposed regulations restricting facilities use cannot be sustained, particularly if construed together with the above-discussed prohibition on sharing employees and services. The New Jersey BPU's regulations authorize a utility and its affiliate providing competitive service to "share office space, office equipment, services and systems" subject to the requirement that "adequate system protections are in place to prevent the accessing of information or data between the utility and its affiliate(s), which would be in violation of this subchapter."[81] The PUCO's rules prohibit shared facilities and services only "if such sharing in any way violates [the extensive Code of Conduct rules contained in the PUCO's regulations cited above]."[82]

The FERC Standards of Conduct and Affiliate Rules previously discussed also apply to physical separation of personnel depending on the nature of the day-to-day duties performed by affiliated companies' personnel.[83] Access to FirstEnergy facilities, and to certain departments within those facilities, is limited through keycard readers to personnel whose job functions require such access, consistent with FERC regulatory restrictions. Standards of Conduct and Affiliate Rules restrictions operate to prevent those employees with physical access from sharing non-public information with certain other employees whose job functions place them within the category of employees prohibited from receiving such information. Even those employees who

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[80] Order at 8.
[81] N.J. Admin. Code tit. 14, §14:4-3.5(e)(1).
[82] Chapter 4901:1-37, Section 4901:1-37-04(A)(2), Ohio Administrative Code.
[83] Federal Energy Regulatory Commission, Docket No. RM07-1-000, *et.al.*, Order No. 717, *et.al.* (2008).

are not bound by the information-sharing restrictions are forbidden to disseminate such information to employees who are prohibited from seeing it under FERC rules. Adding unnecessary additional restrictions on facilities access would increase compliance costs, which would be passed through to customers. FES has built a successful business by offering retail customers the lowest possible price; forcing it to incur the additional costs imposed by this proposed restriction would unnecessarily increase the prices FES' customers would have to pay.

FES and its affiliates have operated in compliance with FERC Standards of Conduct and Affiliate Rules (and their predecessors) for several years. The FERC rules have proven effective at protecting both consumers and the integrity of competition within the electric industry, while at the same time recognizing the business operational needs of the entities operating under those rules. The FERC rules have proved more than sufficient to achieve the goals toward which the Commission's proposed regulations are supposedly aimed.

E. There Is No Record Support for the Extreme Proposed Code of Conduct Revisions

The proposed naming restriction, employee sharing prohibition rule and separation of facilities requirement bear no relation to the Commission's ANOPR or any of the initial or reply comments filed in response thereto, comments which generally found the existing Code of Conduct to be effective.[84] Rather, the proposed new restrictions arose from unpersuasive and speculative arguments made by Retail Energy Supply Association ("RESA") and Direct Energy in the merger proceedings concerning Allegheny Energy, Inc. subsidiaries and FirstEnergy Corp. (hereafter the "Merger Proceedings") that the Commission should establish a restrictive code of

[84] Parties filing comments in response to the ANOPR included the Office of Consumer Advocate, the Energy Association of Pennsylvania, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, West Penn Power Company; the National Energy Marketers Association and the Pennsylvania Energy Marketers Coalition.

conduct solely for FES and affiliated EDCs.[85] Ironically, as Direct Energy itself told the New York Public Service Commission in connection with that agency's consideration of retail marketing principles:

> While even the perception of a serious problem can do great harm to a marketplace, regulation itself cannot begin and end with perception. The integrity of the regulatory process depends on documenting the existence of specific problems that are best-addressed through regulation, and then narrowly fashioning regulation to cure the specific problems identified while limiting to the greatest extent possible the emergence of unintended negative consequences.[86]

In neither the Merger Proceedings nor the subject proceeding has *any* evidence been offered that justifies the restrictions contained in the proposed rules solely due to an EGS's corporate affiliations. Nor has there been any demonstration of actual harms some of the proposed rules purport to alleviate. Finally, as shown in Section II.B.2 above, the proposed regulations are in no way narrowly fashioned to address identified problems.

The Commission conducted neither evidentiary hearings nor cost-benefit analyses that justify the overbroad and punitive rules it proposes in this proceeding. As evident from the above discussions, FES believes the rules fail to comply with the United States Constitution, the Pennsylvania Constitution and the Public Utility Code and cannot be sustained in any event, but the total lack of factual support for the rules dooms them as well.

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[85] *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company*, Docket Nos. A-2010-2176520 and A-2010-2176732 (Opinion and Order entered March 8, 2011), slip op. at 47-48.

[86] *In the Matter of Retail Access Business Practices*, Case 98-M-1343; *Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies*, Case 07-M-1514; *Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to establish a set of commercially reasonable standards for door-to-door sales of natural gas by ESCOs*, Case 08-G-0078; Initial Comments of Direct Energy Services, LLC (2008).

F. The Cost of the Proposed Regulations Far Outweighs Their Benefits

In the Commission's Regulatory Analysis Form to the IRRC, the Commission acknowledges that the corporate structure of companies varies in nature and in the degree of shared corporate services. However, assuming for the sake of argument that the Commission has the statutory authority to enact the proposed regulations, it has engaged in no fact-finding whatsoever that supports its prohibition against the corporate structures of parent companies with affiliated EDCs and EGSs in Pennsylvania, supposedly to protect the viability of a robustly competitive retail electricity market in the state. A complete corporate separation may be the only way to ensure compliance with the proposed regulations; at the very least, substantial and costly corporate reorganization would be necessary for many EGSs with affiliated EDCs to operate in Pennsylvania. In order to completely separate corporate services and physical location, and act as an independent company, FES would have to incur costs that many new start-up firms would require, even though it has been a licensed generation supplier in the Commonwealth since 1998.

Throughout the RMI proceeding, the Commission has stressed how important it considers robust retail competition in Pennsylvania. FES agrees with and supports the Commission's efforts in this regard. However, FES respectfully submits that the promulgation of the proposed regulations would in fact hamper such robust competition by hamstringing the ability of retail marketers with Pennsylvania EDC affiliates to compete against retail suppliers with far bigger parent companies to support them. During the March 21, 2012 *en banc* hearing in the RMI proceeding, Direct Energy was applauded for its investments in the Commonwealth such as its school grant and transportation programs. Direct Energy can afford to fund these programs precisely because it has the support of a huge multi-national corporation in its parent, Centrica

PLC. The witness for GDF Suez-ThinkEnergy stated that her company is building new systems in order to be able to provide new products for its consumer base, small business customers. The ultimate parent company of GDF Suez-Think Energy, GDF Suez S.A., is another huge multi-national corporation which in 2011 had revenues of over €90 billion. These are just two of the retail suppliers against whom FES and every other supplier in the Commonwealth must compete. All other things being equal, FES believes it can compete against these larger suppliers, but only if the playing field remains level. The current Code of Conduct regulations assure this. However, under the proposed Code of Conduct regulations, FES and similarly situated suppliers will be relegated to small-time player status simply because they have affiliated EDCs in the Commonwealth. This outcome would obviously benefit certain retail competitors, while putting others at a distinct disadvantage. The Commission must consider whether it really wants a robustly competitive market with many actively competing suppliers as currently exists in the Commonwealth, and alternatively whether a market effectively limited to a few suppliers with very deep pockets will ultimately benefit Pennsylvania retail customers.

III. CONCLUSION

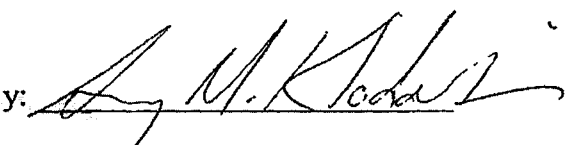
FES appreciates that the currently effective Code of Conduct may require some revisions since the Pennsylvania retail market has evolved and grown substantially since the Code of Conduct was enacted in 2002. Some of the proposed revisions are appropriate and necessary. However, others are not appropriate, or beyond that are unconstitutional or outside the Commission's authority to implement.

- The Commission should reject any requirement that an EGS change its name.

- Separation of shared employees should be limited to those employees whose job functions require the use of competitively sensitive information.
- Necessary physical separation of shared employees can be accomplished through restricting access to competitively sensitive areas and does not require complete geographic separation.

FES respectfully requests that the Commission consider the comments above and revise its proposed revisions to the Code of Conduct regulations in the Final Rulemaking Order in this proceeding accordingly.

FIRSTENERGY SOLUTIONS CORP.

By: 

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