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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

COMMITTEE ON EDUCATION AND THE WORKFORCE

March 24, 2011

Ms. Gail Kursh
Deputy Chief
Legal Policy Section
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: FirstEnergy's unfair and anti-competitive forced sale of 3.75 million light bulbs at excessive prices

Dear Ms. Kursh:

On October 7, 2009, I wrote to Mr. Jon Liebowitz, the Chairman of the Federal Trade Commission, requesting that the FTC conduct an investigation into the unfair and anti-competitive forced sale of 3.75 million CFL bulbs that was announced by FirstEnergy on October 6, 2009, and that would have compelled all of FirstEnergy's captive customers in Northern Ohio not only to overpay for the light bulbs they received, but also to pay First-Energy for the electricity that those customers would **not** be using as a result of the greater efficiency of those CFLs. Since FirstEnergy's program constituted an abuse of its monopoly position and also constituted unfair or deceptive acts or practices that would be injurious to consumers, it fell within the purview of the FTC. Mr. Donald S. Clark, the Secretary of the FTC, informed me that the FTC was deferring to the Antitrust Division of the Justice Department on the matter and that he had forwarded my letter to you.

FirstEnergy's proposal was so outrageous that the former Governor of Ohio, Ted Strickland, caused the Public Utilities Commission of Ohio ("PUCO") to reject the proposal. I am writing today because it was just announced that the PUCO has approved a similar FirstEnergy proposal that will accomplish the same unfair and anti-competitive result.

FirstEnergy

FirstEnergy is the electric utility that has a monopoly in the sale and distribution of electric power in most of Northern Ohio through its subsidiaries, Cleveland Electric Illuminating Company, Toledo Edison and Ohio Edison. FirstEnergy is engaged in interstate commerce, both through its ownership of utilities in multiple states and through its transmission and sale of electric power throughout those states.

FirstEnergy's Original Proposal

In its original proposal, FirstEnergy announced that it would be delivering two CFLs to every residence it serves. FirstEnergy also announced that it would be adding $7.20 per year to the electric bills of its consumers to charge those consumers for: 1) the cost of the two CFLs, 2) the cost of distributing the two CFLs, and 3) the electricity that the consumers would not be using as a result of the energy efficiency of those CFLs.

FirstEnergy purported to justify this unfair and anti-competitive program as its effort to comply with a state energy law that requires utilities to cut their customers' energy use by 22 percent by 2025. However, other utilities chose to accomplish the same result by means that were not anti-competitive, that were not unfair to consumers and that did not result in a forced sale of overpriced products. Those utilities arranged with retailers to provide coupons or discounts that consumers could use to purchase the CFLs of their choice at the best price they could find.

That kind of competitive, marketplace solution was apparently unacceptable to First-Energy. Instead, FirstEnergy attempted to misuse its monopoly power to force consumers to pay for 3.75 million CFLs that FirstEnergy was going to sell to them. Those consumers, who have no choice in their purchase of electricity, and must buy it from FirstEnergy, would have no choice and would have to buy two CFLs from FirstEnergy also. FirstEnergy's plan totally eliminated all marketplace competition in the sale of those 3.75 million CFLs. In addition, FirstEnergy was attempting to leverage its monopoly power further, by providing its customers with information that would make it easier for them to order additional CFLs from FirstEnergy itself, rather than the competitive marketplace.

This conduct was anti-competitive. It would have reduced competition in the sale of CFLs. And it had no reasonable business justification. Compared to the alternative used by the other utilities in Ohio, it served only to leverage FirstEnergy's monopoly power and extend it into the sale of CFLs.

FirstEnergy's program also was unfair, deceptive and injurious to consumers. FirstEnergy was attempting to force its consumers to pay far more for those two CFLs than those consumers would pay to purchase them in the marketplace. FirstEnergy was attempting to force its consumers to buy these two CFLs even if those consumers had already replaced all their incandescent bulbs with CFLs. FirstEnergy was attempting to force consumers to buy these two CFLs even if they were not appropriate for the lights in their homes. FirstEnergy was attempting to force its customers to buy these CFLs even if they were not going to use them. And, incredibly, FirstEnergy was actually charging those customers for the cost of the electricity they would **not** be using as a result of the greater efficiency of these CFLs over the light bulbs those customers were currently using.

FirstEnergy's Latest Plan

FirstEnergy's original plan was to force all consumers to buy two CFLs from FirstEnergy for $21.60 per household, regardless of whether or not they wanted those bulbs or could even use those bulbs. FirstEnergy's latest plan is to force all consumers to pay $10.80 per household to pay for the 3.75 million CFLs, regardless of whether or not they want those bulbs, can use those bulbs, or even receive those bulbs. The households that actually want those bulbs can get up to six of them. But, they can buy those bulbs in stores for less money and, in a few months, they will be able to buy the same bulbs, or different bulbs that better suit their particular lighting fixtures, for a total of $3.00. So FirstEnergy's plan will require homeowners to pay $10.80 for bulbs they don't get, or to overpay $7.80 for bulbs they do get.

This plan is just as unfair and anti-competitive as FirstEnergy's original plan. It will cost each household half as much, but two-thirds of them will be paying for bulbs they do not receive (that assumption has to be built into the plan to offer six bulbs, rather than two bulbs, to each household without increasing the total number of bulbs available), and the other third will not have a choice of whom they buy their bulbs from.

FirstEnergy Is Not Entitled to the "State Action" Immunity

The "state action" immunity is not available to insulate FirstEnergy from the consequences of it anti-competitive and unfair conduct. In order for that immunity to apply, the restraint on trade or competition must be clearly articulated or affirmatively expressed as state policy. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The only policy that the State of Ohio has articulated and expressed is the policy of reducing energy use. That policy is being accomplished by other utilities through a coupon or discount program that is not anti-competitive. It is FirstEnergy, and FirstEnergy alone that has chosen a program that is designed to extend its electricity monopoly into the sale of retail lighting products.

FirstEnergy's program actually works against the policy that the State of Ohio has articulated and expressed. The utilities that have provided their customers with coupons, or that have negotiated discounts from retailers, are empowering their customers to buy CFLs for their entire home and to purchase CFLs that are appropriate for their home and their lighting fixtures. FirstEnergy is offering only six CFLs per household, with no knowledge of whether those light bulbs are appropriate, or even needed, for the homes to which they are being offered. And consumers who use coupons or discounts to buy new CFLs will see an immediate reduction in their electric bills, which should inspire them to buy more CFLs or to install more energy saving features in their homes. FirstEnergy customers who use their six CFLs will not see any reduction for three years. Instead, their electric bills will go up.

Clearly, the coupon/discount alternative is more consistent with the policy articulated and expressed by the State of Ohio. It also allows consumers to buy the light bulbs they need, at lower prices, in the competitive marketplace. The only interest that is served by the FirstEnergy program is the interest of FirstEnergy's profits.

Renewed Request for Investigation and Action

For these reasons, I am renewing my request for an investigation into FirstEnergy's unfair and anti-competitive forced sale of light bulbs to consumers. I am also requesting that the Department of Justice attempt to prevent FirstEnergy from executing its unfair and anti-competitive program.

Sincerely,

Dennis J. Kucinich

Dennis J. Kucinich
Member of Congress