

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Initial Certification Application)	
of Suvon, LLC d/b/a FirstEnergy Advisors to Provide)	
Aggregation and Broker Services in the State of)	Case No. 20-103-EL-AGG
Ohio.)	

**NOPEC-OCC REPLY TO FIRSTENERGY ADVISORS' MEMORANDUM CONTRA
THE NOPEC-OCC MOTIONS TO SUSPEND THE CERTIFICATION APPLICATION
AND FOR A HEARING**

I. Introduction

Ohio law is clear (even if not to FirstEnergy Advisors). No regulated utility can provide competitive retail electric service in Ohio unless it does so through a “fully separated affiliate.” R.C. 4928.17(A)(1). That affiliate must “function independently” of the regulated utility. O.A.C. 4901:1-37-04(A)(1) and (3). These provisions are intended to prevent the regulated utility from abusing its market power and to preserve fair competition in the retail electric market. This is important to consumers who depend on the market to bring them reasonably priced electricity service.

In their Joint Motion filed February 10, 2020, the Consumer Groups¹ showed that FirstEnergy Advisors’² management team is so inseparable from that of its affiliate regulated utilities³ that it is impossible for FirstEnergy Advisors to function independently. For this reason, FirstEnergy Advisors should not conduct business in Ohio using the management team

¹ Northeast Ohio Public Energy Council (“NOPEC”) and the Office of the Ohio Consumers’ Counsel (“OCC”).

² The applicant, Suvon, LLC (“Suvon”) seeks to conduct business in Ohio as “FirstEnergy Advisors.” It lists its office at the same 76 S. Main Street, Akron office as the Regulated Utilities headquarters.

³ FirstEnergy Advisors’ affiliated regulated utilities are The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company (the “FirstEnergy Utilities” or “Regulated Utilities”).

proposed in its Application. Because the Application lacks an appropriate management team, the Commission should conclude that FirstEnergy Advisors has failed to show that it has the managerial capability to provide competitive retail electric service in Ohio. R.C. 4928.08(B); 4901:1-37-10(C)(2).

The Application also should not conduct business in Ohio under the “FirstEnergy” brand name. As explained in the Consumer Groups’ Joint Motion, Suvon’s use of the Regulated Utilities’ name violates O.A.C. 4901:1-37-04(D)(7). Joint Motion at 15-17. Contrary to FirstEnergy Advisors’ assertion, use of the FirstEnergy name also is unfair and misleading, in violation of R.C. 4928.10 and O.A.C. 4901:1-21-03(A).

For consumer protection, the PUCO should deny this Application unless Suvon (1) changes its managers and officers so that they do not overlap with the regulated utility’s directors and officers, (2) agrees not to conduct business in Ohio under the “FirstEnergy” brand name, and (3) changes its physical headquarters so that it is not housed in the same offices as personnel of the FirstEnergy Utilities at 76 South Main Street, Akron, Ohio. Alternatively, the PUCO should conduct a hearing in this matter as expeditiously as possible, with a schedule that provides ample opportunity to conduct discovery.

FirstEnergy Advisors’ arguments raised in its Memorandum Contra filed February 18, 2020, offer absolutely nothing to change this conclusion.

II. FirstEnergy Advisors’ arguments against suspension of its application are moot, because the PUCO has suspended it.

FirstEnergy Advisors first argues that the PUCO long ago resolved the issues raised in the Consumer Groups’ Joint Motion. It states that the PUCO has no basis to suspend the Application. Memorandum Contra at 10. However, the PUCO suspended the Application for

“good cause” the day after the Consumer Groups requested it.⁴ FirstEnergy Advisors’ claim that the suspension is unwarranted is moot.⁵ Having found good cause to suspend the Application, the PUCO has rightfully determined that the issues raised by the Joint Motion are not settled and are appropriate for further review in this proceeding.

III. FirstEnergy Corp’s history of managing affiliate relationships does not justify granting this Application.

FirstEnergy Advisors claims that its Application should be granted because FirstEnergy Corp has operated affiliated competitive retail energy suppliers for nearly 20 years without incident. FirstEnergy Advisors asserts that it will continue to follow the Regulated Utilities’ current corporate separation plan (the “Plan”) if the Application is approved.⁶ Memorandum Contra at 4-5.

But FirstEnergy Advisors’ promise to abide by the Plan does little to protect customers from potential market abuse. As explained in the Joint Motion, FirstEnergy Advisors ignores that:

- (A) the Commission has never conducted an in-depth review of the Plan to determine if the affiliated competitive retail electric service provider and Regulated Utilities “function independently;”
- (B) the Plan failed to protect consumers from the FirstEnergy Utilities’ attempt to force captive distribution customers to bail out their financially struggling competitive retail electric service provider affiliate;⁷ and
- (C) the Plan did not prevent the inappropriate sharing of employees and the FirstEnergy brand name.⁸

⁴ Entry, February 11, 2020.

⁵ FirstEnergy Advisors has not opposed NOPEC’s or OCC’s motions to intervene filed February 10, 2020. The motions should be granted.

⁶ The FirstEnergy Utilities are responsible for compliance with their corporate separation plan. FirstEnergy Advisor’s defense of the plan is further evidence that it does not function independently of its regulated affiliates.

⁷ See Case No. 14-1297-EL-SSO filed August 4, 2014 (“ESP IV”).

⁸ See Case No. 17-974-EL-UNC, 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 (May 14, 2018) (“Audit Report”).

FirstEnergy Advisors urges the Commission to ignore this history. Memorandum Contra at 10. However, this history forms the basis of the Joint Motion's recommendations and the reasons why the Commission suspended this Application for further consideration. It is a vital part of this proceeding (see, Joint Motion at 6-10) and is summarized as follows for the Commission's further review:

A. The FirstEnergy Utilities' corporate separation plan has escaped in-depth review.

Beginning in the year 2000, the FirstEnergy Utilities operated under a plan that merely "functionally" separated the affiliates.⁹ In 2009, the Regulated Utilities proposed the current Plan. The Plan was approved "as filed" as a part of the broad stipulated package that adopted the FirstEnergy Utilities' electric security plan.¹⁰ The Plan has escaped the Commission's in-depth review, until recently when the PUCO ordered an audit of all utilities' corporate separation plans to ensure compliance with Ohio law. It would be a mistake to disregard that recent audit and give the FirstEnergy Utilities a pass, based on an approved plan nine years ago. Years later, it cannot be relied upon to protect consumers and preserve the state policy codified in R.C. 4928.02.

B. The power purchase agreement proposed in FirstEnergy's fourth electric security plan (ESP IV) exposed the insufficient protection that the Plan provides to FirstEnergy's captive distribution customers.

FirstEnergy Advisors' claim that the Regulated Utilities' Plan has protected captive distribution customers for nearly 20 years is simply not true. The Regulated Utilities' power purchase agreement ("PPA") proposed in ESP IV is emblematic of utility affiliate abuses in Ohio.

⁹ See Case No. 99-1212-EL-ETP, Opinion and Order (July 19, 2000).

¹⁰ See Case No. 10-388-EL-SSO, Opinion and Order (August 27, 2010) at 16, 27, approving the Plan filed in Case No. 09-462-EL-UNC.

It was under the current Plan that the FirstEnergy companies¹¹ developed the scheme to require FirstEnergy customers to subsidize the failing power plants of their affiliate (FirstEnergy Solutions). The Federal Energy Regulatory Commission (“FERC”) interceded (upon legal action by OCC, power plant owners and others) and signaled that the PPA negotiated between the FirstEnergy Utilities and FirstEnergy Solutions would unlawfully require the Regulated Utilities’ captive customers to subsidize FirstEnergy Solutions.¹² ESP IV showed that the regulated utilities’ Plan is insufficient to “effectuate the policy specified in section 4928.02 of the Revised Code.” R.C. 4928.17(A)(1) and 4928.17(C). These policies include the prohibition against cross-subsidization and the prevention of market power abuses that were evident in the PPA scheme. See R.C. 4928.02(C), (H) and (I).

C. The 2018 independent audit of the Regulated Utilities’ Plan confirms that FirstEnergy Advisors must change its management team, brand name, and headquarters location if it is to be certified to provide competitive retail electric service provider in this state.

The PUCO recognized the need to revisit all regulated utilities’ corporate separation plans as a part of its Investigation of Ohio’s Retail Electric Service Market (“*Market Investigation*”). In that case, the PUCO stated that “it is imperative that utility and affiliate activities undergo vigilant monitoring in order to ensure their compliance with Ohio Rev. Code 4928.17 and Ohio Adm. Code 4901:1-37, and in order to further Ohio’s policies pursuant to

¹¹ FirstEnergy Corp, FirstEnergy Service Company, the FirstEnergy Utilities, and their affiliated competitive retail electric service provider, FirstEnergy Solutions.

¹² *Elec. Power Supply Ass’n v. FirstEnergy Solutions Corp.*, 155 F.E.R.C. P61, 101, 2016 FERC LEXIS 686 (F.E.R.C. April 27, 2016) (“*FERC Order*”). Specifically, FERC found that the costs to be charged to distribution customers would “present the potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility.” *Id.* at ¶ 55, quoting Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198.

Ohio Rev. Code 4928.02.”¹³ The PUCO ordered that each electric distribution utility undergo an audit to ensure compliance with Ohio law.

SAGE Management Consultants completed an audit of the FirstEnergy Utilities’ Plan and recommended that:

1. a key officer of a competitive retail electric service provider affiliated with the Regulated Utilities not be shared with FirstEnergy Services Company because he or she would receive both regulated and unregulated reports,¹⁴ and
2. the affiliated competitive retail electric service provider be prevented from using the “FirstEnergy” name.¹⁵

The Audit Report’s independent findings and recommendations confirm that the sharing of a single key officer can violate the Regulated Utilities’ Plan. This violation is compounded in this proceeding where nearly all key executive officers, managers and directors of FirstEnergy Advisors and the Regulated Utilities are identical, as discussed further below. Moreover, Suvon intends to use the FirstEnergy brand name (d/b/a FirstEnergy Advisors), which the Audit Report concluded was expressly forbidden by the PUCO’s rules, which also is discussed below.

The Consumer Groups appreciate that the PUCO acted quickly to suspend this Application. The PUCO should apply the findings of the Audit Report in this proceeding. To protect consumers against the abuse of market power (R.C. 4928.02), the Consumer Groups request that the Commission deny FirstEnergy Advisors’ certificate Application unless it changes its management team (ridding itself of overlapping directors, managers and officers), agrees not to conduction business in Ohio under the “FirstEnergy” brand name, and changes the affiliate’s physical headquarters so that it is not housed in the same offices as personnel of the FirstEnergy Utilities at 76 South Main Street, Akron, Ohio.

¹³ See Case No. 12-3151-EL-COI, Finding and Order (March 26, 2014) at 16.

¹⁴ Audit Report at 34.

¹⁵ *Id.*, at 98-99.

IV. Forming a competitive retail electric service providers that is legally separate from its regulated affiliates and allocating shared employees' time between the two does not mean that the affiliates "function independently" as required by O.A.C. 4901:1-37-04(A)(1). These acts do nothing for consumer protection.

FirstEnergy Advisors asserts that its proposed management and operations are compliant with the PUCO's corporate separation rules because:

- (A) as a limited liability company, it is "legally separate" from the FirstEnergy Utilities, and
- (B) a separate legal entity has no restrictions on the use of shared employees as long as they record and charge their time based on fully allocated costs under O.A.C. 4901:1-21-37(A)(5).

Memorandum Contra at 2 and 4.

Its Memorandum Contra shows that FirstEnergy Advisors' does not understand the legal basis for the Consumer Groups' position. More importantly, FirstEnergy Advisors does not understand, or it chooses to disregard, the PUCO's corporate separation rules.

A. Creating a separate legal entity is insufficient, standing alone, to comply with the requirement that a competitive retail electric supplier and its regulated affiliates be "fully separated." It is insufficient to adequately protect consumers.

FirstEnergy Advisors argues that it is "fully separated" from the FirstEnergy's Utilities because, as a limited liability company, it is a distinct legal entity. R.C. 4928.17(A)(1) requires that competitive and regulated affiliates be "fully separated." Although the term "fully separated" naturally requires that the affiliates be separate *legal* entities, it also requires that the entities "function independently" of each other. O.A.C. 4901:1-37-04(A)(1). Legal separation alone is insufficient.

A competitive retail electric service provider and its affiliated regulated utilities can be legally separate entities but still not function independently, if controlled and operated by the same management team. The Audit Report confirms that the comingling of a key management

position under the FirstEnergy Corp structure violates the corporate separation rules. This is because the competitive entity would be privy to the regulated entity's information (and vice versa) though interaction with each other, including interactions associated with both entities use of FirstEnergy Service Company.¹⁶

This problem is exponentially exacerbated in this proceeding. The Audit Report involved only one officer of FirstEnergy Solutions who was shared with FirstEnergy Service Company and therefore privy to regulated and unregulated reports. Under this Application, all three of FirstEnergy Advisors' managers - in a limited liability company, akin to the directors of a corporation - hold the highest level executive positions with FirstEnergy Corp. and FirstEnergy Services Company. Moreover, two of FirstEnergy Advisors' managers also are directors of the Regulated Utilities.

COMMON MANAGERS/DIRECTORS/EXECUTIVE OFFICERS		
FirstEnergy Corp/FirstEnergy Service Company ¹⁷	FirstEnergy Advisors ¹⁸	Regulated Utilities ¹⁹
Charles Jones, CEO, Pres FE Utilities (FEC)	Charles Jones, Manager	Charles Jones Director
D.M. Chack, Pres. FE Ohio Utilities (FEC) Sr. VP Mkting/Branding (FESC)	D.M. Chack, Manager	
S.E. Strah, Sr. VP (FEC) CFO (FESC)	S.E. Strah, Manager	S.E. Strah Director
		J.E. Pearson, Director
		S.L. Belcher, Director

This commonality of management control is so pervasive that it is impossible for FirstEnergy Advisors to “function independently” from the Regulated Utilities. Further, the

¹⁶ Audit Report at 34.

¹⁷ See firstenergycorp.com/investor/corporate_governance/officers_and_directors.html; investors.firstenergy.com

¹⁸ See Suvon Initial Certification Application, Case No. 20-103-EL-CRS, Exhibit A-12 (January 17, 2020).

¹⁹ See Companies' Annual Reports, 2018 4Q FERC Form 1.

Regulated Utilities’ and FirstEnergy Advisors’ officers and employees are all housed in the same building: 76 S. Main Street, Akron offices of the Regulated Utilities.

B. The method for allocating shared employee costs under O.A.C. 4901:1-37-04(A)(5) is irrelevant when the issue in this proceeding is whether, for consumer protection, it is lawful to share employees in the first place. Sharing employees is not permitted when it is so pervasive that affiliated entities cannot function independently, as required by O.A.C. 4901:1-37-04(A)(1).

FirstEnergy Advisors further alleges that the PUCO’s rules place no restrictions on sharing officers and directors as long as they “appropriately record and charge their time based on fully allocated costs.” O.A.C. 4901:1-37-04(A)(5). FirstEnergy Advisors completely misses the point. The corporate separation rules²⁰ are structured such that employees may be shared only if they do not violate the code of conduct provisions of O.A.C. 4901:1-37-04(D). See O.A.C. 4901:1-37-04(2) and (4). If employees are shared, the sole function of O.A.C. 4901:1-37-04(A)(5) is to provide how their costs are to be allocated between the sharing entities.

These rules are not determinative of this case. This case is not about allocating shared employee costs under O.A.C. 4901:1-37-04(A)(5). Here, the issue is whether it is lawful to share employees in the first place. Sharing employees is not permitted when it is so pervasive that

²⁰ O.A.C. 4901:1-37-04 provides in part:

(A) Structural safeguards.

- (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.
- (2) Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall not share facilities and services if such sharing in any way violates paragraph (D) of this rule.
- (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.
- (5) An electric utility shall ensure that all shared employees appropriately record and charge their time based on fully allocated costs.

affiliated entities cannot function independently of each other, as required by O.A.C. 4901:1-37-04(A)(1) and by R.C. 4928.17 (must provide competitive service as a fully separated affiliate).

Cost allocation measures are not germane in this situation. Although an executive's time spent between regulated and non-regulated activities can be assigned to either entity, there is no way to segregate the executive's knowledge of regulated operations when making decisions affecting the non-regulated affiliate, and vice versa. The Audit Report recognizes this impossibility and ESP IV demonstrates its practical harm to consumers.

V. FirstEnergy Advisors' use of the FirstEnergy brand name can be misleading for consumers, and violates the corporate separation rules.

FirstEnergy Advisors then argues that the PUCO long ago settled whether a competitive affiliate may use a regulated utility's trade name. It cites a 2012 rulemaking proceeding in which the PUCO found that the practice should "not...necessarily" be prohibited "absent other circumstances indicating that use of the name is unfair, misleading, or deceptive."²¹ These other circumstances are ever present in this case, considering that FirstEnergy Solutions is exiting the competitive retail electric market and ceasing to use the FirstEnergy name at the time Suvon (d/b/a FirstEnergy Advisors) is entering and seeking to use the FirstEnergy name.

FirstEnergy Solutions solicited customers as a power marketer. FirstEnergy Advisors now proposes to solicit those same customers as a broker and/or aggregator. Customers will be confused and misled as to whether it is their traditional regulated utility that is offering to serve them, as recognized in the Audit Report. They also will be confused as to whether it is FirstEnergy Solutions that is continuing to offer service. Of course, as the Audit Report states, use of the same name implies a link between the competitive retail energy service provider and

²¹ See *In Re Review of Chapters 4901:1-21 and 4901:1-24, Ohio Administrative Code*, Case No. 12-1924-EL-ORD, Finding and Order (December 18, 2013) at 18 ("Case No. 12-1924")..

the Regulated Utilities. This implied linkage will enable FirstEnergy Advisors to trade on FirstEnergy's name recognition and interfere with the competitive market. (Audit Report at 98-99.) Use of the FirstEnergy brand name under these circumstances is an unfair marketing practice that violates R.C. 4928.10 and O.A.C. 4901:1-21-03(A).

Importantly, the issue in this proceeding is a matter of first impression for the PUCO. Although Case No. 12-1924 focused on whether use of the same brand name was unfair, misleading or deceptive (it is), the issue in this case and in the Audit Report is whether the use of the FirstEnergy name violates corporate separation standards, namely O.A.C. 4901:1-37-04(D)(7).²² That section prohibits the electric utility from endorsing any marketer that is an affiliate.

The Audit Report similarly concluded that, by virtue of using the name "FirstEnergy Solutions," it is impossible for the regulated utilities' representatives *not* to "indicate" that FirstEnergy Solutions is an affiliate, because they share a common name. (Audit Report, at 98.) Indeed, by virtue of their widespread branding program the regulated utilities effectively are "endorsing" their competitive affiliate over other electric suppliers. *Id.*

It also must be noted that the precedent for permitting utility affiliated electric suppliers to use the utility name was created in a case where the affiliates had been using the utilities' name for a number of years. The PUCO reasoned that to require the affiliated supplier to change its name would result in customer confusion.²³

²² O.A.C. 4901:1-37-04(D)(7) provides:

(7) The electric utility, upon request from a customer, shall provide a complete list of all competitive retail electric service providers operating on the system, but shall not endorse any competitive retail electric service providers, indicate that an electric services company is an affiliate, or indicate that any competitive retail electric service provider will receive preference because of an affiliate relationship.

²³ See *In Re Review of Chapter 4901:1-20, Ohio Administrative Code*, Case No. 04-48-EL-ORD, Finding and Order (July 28, 2004) at 9 ("Case No.04-48").

Here, however, FirstEnergy Advisors has yet to commence service. Requiring it to operate under a different name not linked to FirstEnergy will not confuse customers. Indeed, as the Auditor concluded, it will eliminate confusion for customers who may be misled into believing they are being served by their regulated utility. It is imperative to require the name change before service begins.

Finally, FirstEnergy Advisors raises the worn argument that preventing it from using the FirstEnergy name will infringe upon constitutionally protected commercial speech. The FirstEnergy Utilities raised this same argument in Case No. 04-48, which the PUCO rejected, finding:

Government may regulate commercial speech in ways that it may not regulate protected noncommercial speech, and may ensure that commercial speech is not false, deceptive, misleading, or coercive. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), 425 U.S. 748, at 770-772; *City of Cincinnati v. Discovery Network* (1993), 507 U.S. 410, 410; and *Ohrlik v. Ohio State Bar Assn.* (1978), 436 U.S. 447, 457. Commercial speech is not protected by the First Amendment when it does not concern a lawful activity and is misleading. *Discovery Network, supra* at 434, explaining the right to commercial free speech addressed in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n* (1980), 447 U.S. 557. [*Id.* at 9.]

V. Conclusion

The Consumer Groups appreciate that the PUCO suspended FirstEnergy Advisors' application. Upon the PUCO's further review of the Application, the PUCO should deny this Application unless Suvon (1) changes its managers and officers so that they do not overlap with the Regulated Utility's directors and officers, (2) agrees not to conduct business in Ohio under the "FirstEnergy" name and (3) changes the affiliate's physical headquarters so that it is not housed in the same offices as personnel of the FirstEnergy Utilities at 76 South Main Street, Akron, Ohio. Alternatively, the PUCO should conduct a hearing with a schedule that provides ample opportunity to conduct discovery.

Respectfully submitted,

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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 *Reply* was served on the persons stated below via electronic transmission this 25th day of February 2020.



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Case No(s). 20-0103-EL-AGG

Summary: Text NOPEC-OCC Reply To FirstEnergy Advisors' Memorandum Contra The NOPEC-OCC Motions To Suspend The Certification Application and For A Hearing electronically filed by Teresa Orahoad on behalf of Glenn S. Krassen