BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Suvon, LLC d/b/a FirstEnergy Advisors For Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio.	)))))	Case No. 20-0103-EL-AGG

SUVON, LLC D/B/A FIRSTENERGY ADVISORS' MEMORANDUM IN OPPOSITION TO THE MOTION TO INTERVENE FILED BY PALMER ENERGY COMPANY, INC.

I. INTRODUCTION

The only question relevant to whether FirstEnergy Advisors is licensed as a broker is whether FirstEnergy Advisors meets the criteria for qualification to be a broker. It does. Speculative arguments about what FirstEnergy Advisors *would* or *could* or *might* do once licensed are not ripe for the Commission's consideration and thus should be outright rejected. The arguments raised by Palmer Energy Company, Inc. ("Palmer Energy") have been raised in numerous proceedings for well over a decade. In every instance, the Commission correctly rejected those arguments because it has chosen to follow Ohio law. The Commission should follow its well-established precedent, deny the request for intervention, deny the request to commence a Commission investigation, and grant FirstEnergy Advisors' license application.

As Palmer Energy acknowledges, FirstEnergy Advisors would be a competitor to Palmer Energy. Palmer Energy seeks to limit competition by asking FirstEnergy Advisors to prove a negative. Here, it is Palmer Energy's request that FirstEnergy Advisors prove today it will not violate Ohio law in the future. That is simply not a standard which has ever been used by this Commission, nor is it a standard which is possible. FirstEnergy Advisors is obligated to establish that it currently complies with the obligations for certification and to agree to follow all relevant

Ohio law. FirstEnergy Advisors has done so and has no intention of ever violating Ohio law. If there are issues in the future regarding how FirstEnergy Advisors actually operates, those claims can be evaluated in the future when those facts are known. In the meantime, FirstEnergy Advisors cannot be asked to perform the impossible task of proving a negative. Palmer Energy's request that FirstEnergy Advisors prove a negative should be rejected.

II. ARGUMENT

A. Use of the name "FirstEnergy Advisors" is not a violation of Commission Rules, and any restriction on such use imposed by the Commission would be a constitutional violation.

Palmer Energy first argues that FirstEnergy Advisors should not be permitted to utilize the "FirstEnergy" name because Palmer Energy "would be at a disadvantage" and its "contracts and business will be negatively impacted."[1] Palmer Energy provides no factual support for its claim. Palmer Energy also ignores that the Commission has already analyzed and ruled that unregulated entities can use names affiliated with regulated entities.[2] In fact, the Commission went even further and held that, "absent other circumstances indicating that the use of the name and/or logo is unfair, misleading, or deceptive," the Commission did "not believe that an unaffiliated CRES supplier should necessarily be prohibited from using the incumbent utility's name and/or logo."[3]

Seemingly in an attempt to overcome this well-established Ohio law, Palmer Energy also claims that because "FirstEnergy Advisors intends to use the FirstEnergy name as a broker and aggregator (a different relationship than a supplier like FirstEnergy Solutions)," this purportedly "brings into question" FirstEnergy Advisors' capability as a CRES provider to avoid violations of

[1] Motion at 3.
[2] *See In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code*, Case No. 12-1924-EL-ORD, Finding and Order (Dec. 18, 2013).
[3] *Id.*

Ohio Administrative Code Rule ("OAC") 4901:1-21-03.[4] However, there is no evidence that the use of the name violates any Commission Rules—nor does Palmer Energy provide any.

Indeed, Ohio law expressly requires that customers be informed of an affiliate relationship with an Ohio utility. OAC 4901:1-21-05(C)(8)(g) states it is inherently deceptive to "[f]ail to conspicuously disclose an affiliate relationship with an existing Ohio electric utility" when advertising or marketing.[5] As it would be improperly deceptive to fail to disclose this relationship, FirstEnergy Advisors will comply with all Commission rules, including the rules that require an affiliate disclaimer[6] and the requirement that employees disclose the entity the employee is representing.[7]

Furthermore, restricting the use of a trade name is a constitutional violation. 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.[8] AEP Ohio took a similar approach and argued that "[i]nfringement on a company's right to choose its own name is not an area appropriate for Commission review."[9] Indeed, other Ohio utilities had or have affiliates with similar trade names, including AEP Energy Inc.,[10] Duke Energy Retail Sales,[11] Dominion Retail Inc.,[12] and Vectren Retail, LLC.[13] If it were truly misleading to

[4] Motion at 4–5.
[5] Ohio Admin. Code 4901:1-21-05(C)(8)(g).
[6] Ohio Admin. Code 4901:1-21-05(C)(8)(g).
[7] Ohio Admin. Code 4901:1-37-04(D)(11).
[8] *See Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir.1981) (finding that a trade name is a valuable asset which conveys information to customers and, as such, even an obviously racist trade name may not be prohibited by a municipality in light of Plaintiff's First Amendment rights to the trade name).
[9] Case No. 12-1924-EL-ORD, AEP Ohio Reply Comments at 2.
[10] Case No. 10-0384-EL-CRS; Case No. 12-1491-GA-CRS.
[11] Case No. 04-1323-EL-CRS.
[12] Case No. 00-1781-EL-CRS; Case No. 02-1757-GA-CRS.
[13] Case No. 11-1078-EL-CRS.

use the same name as a regulated utility, the Commission would not have repeatedly approved these names over the last eighteen years.

Finally, Palmer Energy attempts to avoid this well-established law by claiming that a broker relationship is somehow different than the relationship with a competitive supplier.[14] There is no legal distinction between these types of entities and so this argument is moot. Moreover, factually there is no such distinction. The competitive supplier relationship is a major financial commitment on both sides. After an extensive mutual disclosure of information, the parties enter into a contract which ties them together for years and exposes each to a possible costly default. No broker agreement has that type of potential financial impact, so to claim there is some different relationship is simply incorrect.

B. There is no prohibition on the use of shared service employees.

Palmer Energy next argues that there is a *potential* for unfair competition that is presented by the commonality of management that could "easily result in unfair, misleading, and deceptive practices."[15] Palmer Energy tries to bolster its claim by arguing that an "additional advantage" exists by "being under common management with the FirstEnergy EDUs, sharing the same office address and sharing the same email domain," but fails to explain how having a shared office address and email domain constitutes having any purported advantage.[16] Fatal to Palmer Energy's position is its failure to acknowledge that under Ohio law, there is simply no prohibition on the use of shared service employees.

Indeed, Ohio has extensive experience in working with shared service employees who properly allocate their time among different entities. The Commission adopted OAC 4901:1-37-

[14] Motion at 3–4.
[15] Motion at 2, 4.
[16] Motion at 3–4.

04(A)(5) and 4901:1-37-08, which specifically address how shared service employees should be accounted for under a cost allocation manual. As Ohio law expressly permits the use of shared service employees, and Palmer Energy cites nothing in support of its position, this argument should be outright rejected as a matter of law.

C. Because FirstEnergy Advisors is a separate entity from the utilities and will comply with all corporate separation rules, there is no violation of R.C. 4928.17 or any Commission Rules.

Palmer Energy also claims that the "limited facts known about FirstEnergy Advisors" raises the issue of whether its business activities will result in a violation of Ohio Revised Code Section 4928.17 and OAC 4901:1-37-04(D)(7) and (9).[17] Palmer Energy claims that FirstEnergy utility External Affairs Managers could violate these sections by discussing FirstEnergy Advisors with third parties.[18] This argument is misinformed and also fails. Palmer Energy has no evidence that any External Affairs personnel are utility employees—they are not. Palmer Energy should be aware that OAC 4901:1-37-04(D)(11) requires shared employees to clearly disclose upon whose behalf public representations are being made. Employees acting on behalf of FirstEnergy Advisors will comply with Ohio law to ensure that the imagined scenarios offered by Palmer Energy remain imaginary.

Palmer Energy next claims that sharing a physical office address is somehow inappropriate.[19] That is not supported in Ohio law, as other affiliates have shared office space with regulated entities in the past. As discussed above, so long as confidential information is not made available to FirstEnergy Advisors, sharing office space is not a violation. Contrary to Palmer Energy's unsupported insinuations, FirstEnergy Advisors is a separate entity from the utilities and

[17] Motion at 5.
[18] Motion at 5.
[19] Motion at 5.

there are no subsidies from the utilities to FirstEnergy Advisors. So long as FirstEnergy Advisors complies with all corporate separation rules and ensures that it adheres to the general provisions concerning affiliate relationships between electric utilities and affiliates, there is no violation of R.C. 4928.17 or any Commission Rules.

D. Because brokers are required to show managerial experience and capabilities when applying for a license, Palmer Energy's argument that referring to individuals with such experience somehow calls into question FirstEnergy Advisors' ability to comply with Commission Rules is baseless.

Palmer Energy first claims that FirstEnergy Advisors has failed to show that it has the managerial and technical expertise to be a broker.[20] This is simply incorrect. Among other relevant individuals, Brian Farley and Lori Rader have decades of experience in Ohio's competitive market and were specifically identified in the Application. It is difficult to imagine any two people better prepared from a managerial and technical perspective to operate a brokerage business.

Palmer Energy then argues that because FirstEnergy Advisors' Application has identified members of FirstEnergy's leadership team as being key members of FirstEnergy Advisors, this brings into question FirstEnergy Advisors' capability of complying with OAC 4901:1-21-03, which prohibits CRES providers from engaging in unfair, misleading, deceptive, or unconscionable acts or practices.[21] This argument fails because nothing in Ohio law prevents employees from managing both regulated and unregulated activities so long as they do not inappropriately act as a conduit between those entities. As there is no evidence of any method by which customer information will be improperly disclosed, or any intent by FirstEnergy Advisors to do so, there is no reason to deny FirstEnergy Advisors' Application.

[20] Motion at 4.
[21] Motion at 4–5.

In short, upon review of Palmer Energy's motion, it becomes clear that Palmer Energy's true motive for seeking intervention in this proceeding is to thwart the fair competition that FirstEnergy Advisors will present in the marketplace as a certified broker and aggregator.[22] Because this is not a valid reason to deny FirstEnergy Advisors' Application, Palmer Energy's arguments must be rejected in their entirety.

III. CONCLUSION

Palmer Energy fails to raise any arguments that warrant a Commission investigation prior to granting FirstEnergy Advisors' Application. Accordingly, FirstEnergy Advisors respectfully requests that the Commission deny Palmer Energy's request and approve FirstEnergy Advisors' Application.

Respectfully submitted,

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[22] Motion at 3, 6.

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 9th day of March 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander
Attorney for Suvon, LLC d/b/a FirstEnergy Advisors

Summary: Memorandum Suvon, LLC d/b/a FirstEnergy Advisors' Memorandum in Opposition to the Motion to Intervene filed by Palmer Energy Company, Inc. electronically filed by Ms. Kari D Hehmeyer on behalf of Suvon, LLC d/b/a FirstEnergy Advisors