

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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May 22, 2020

*Special Counsel for the
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**APPLICATION FOR REHEARING
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Suvon LLC d/b/a FirstEnergy Advisors (“FirstEnergy Advisors”) is an affiliate of the regulated FirstEnergy electric distribution companies (“FirstEnergy Utilities”) that serve two million consumers. As an affiliate of the regulated FirstEnergy Utilities and as a would-be participant in Ohio’s deregulated electricity markets, FirstEnergy Advisors (and the FirstEnergy Utilities) must comply with Ohio law and the PUCO’s rules regarding corporate separation. Corporate separation laws and rules are put in place to protect competition and the benefits of lower prices and greater innovation it brings to consumers. FirstEnergy Advisors presents a risk to those consumer benefits of competition, as was the concern of NOPEC, OCC, Vistra Energy Corp. (“Vistra”), the Northwest Aggregation Coalition (“NOAC”), Palmer Energy Company, Inc. (“Palmer”), Energy Professionals of Ohio LLC (“EPO”), the Retail Energy Supply Association (“RESA”), and Interstate Gas Supply (“IGS”). .

FirstEnergy Advisors’ filed its initial certification application in the above-captioned proceeding on January 17, 2020, with the Public Utilities Commission of Ohio (“PUCO”).

However, the PUCO declined to adopt a procedural schedule¹ or compel discovery² to fully explore the serious issues related to FirstEnergy Advisors' Application. Over the objections of several parties, the PUCO approved FirstEnergy Advisors' Application as supplemented, without allowing due process.³ The Order approving the Application is unlawful and unreasonable in the following respects and the Application should have been denied:

ASSIGNMENT OF ERROR NO. 1:

The PUCO erred by failing to find that FirstEnergy Advisors' Application (as supplemented) violates R.C. 4928.08(B) and Ohio Adm. Code 4901:1-24-10(C), and therefore it should be denied.

ASSIGNMENT OF ERROR NO. 2:

The PUCO erred by denying the discovery, which intervenors are entitled to conduct (in violation of R.C. 4903.082, Ohio Adm. Code 4901-1-16(A) and Ohio Adm. Code 4901-1-17(A)), by failing to hold a hearing, and by failing to afford due process to intervenors. The Application should be denied.

ASSIGNMENT OF ERROR NO. 3:

The PUCO's decision approving the Application is unlawful and is unsupported by record evidence in violation of R.C. 4903.09. The Application should be denied.

ASSIGNMENT OF ERROR NO. 4:

The PUCO erred by failing to render a decision in this case on the inseparable issues pending in its audit of the FirstEnergy Utilities' corporate separation, Case No. 17-974-EL-UNC. Alternatively, the PUCO erred by failing to hold its decision in abeyance in this case until it fulfills its intention to render a decision in the audit case, Case No. 17-974-EL-UNC. FirstEnergy Advisors' Application should be denied or held in abeyance pending due process and a decision in the audit case.

Under R.C. 4903.10 and O.A.C. 4901-1-35, OCC respectfully requests rehearing of the PUCO's April 22, 2020 Finding and Order ("Order") approving FirstEnergy Advisors' application for certification as a competitive retail electric service power broker and aggregator.

¹ See Interstate Gas Supply, Inc.'s Reply in Support of Motion to Intervene and Request to Establish a Procedural Schedule (April 16, 2020).

² OCC's Motion to Compel FirstEnergy Advisors to Respond to OCC's First Set of Discovery (April 17, 2020); NOPEC's Motion to Compel (March 20, 2020).

³ Finding and Order (April 22, 2020) ("Order").

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its April 22, 2020 Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In seeking to be certified as an aggregator and power broker, a would-be participant in Ohio’s deregulated electricity markets must demonstrate that it can and will comply with Ohio law and the PUCO’s rules regarding corporate separation.⁴ For reasons this case makes obvious, these rules and laws exist to prevent affiliates of monopoly utilities from leveraging that relationship to gain an unfair advantage to the detriment of both other competitors and consumers who benefit from competition.⁵ FirstEnergy Advisors failed to meet its burden to demonstrate that it is able to comply with PUCO rules, orders, and Ohio law on corporate separation.⁶

⁴ See Ohio Adm. Code 4901-1-24-05(A).

⁵ See, e.g., R.C. 4928.17, Ohio Adm. Code Chapter 4901:1-3.

⁶ See Ohio Admin. Code 4901:1-24-10(C), which requires an applicant seeking to provide competitive electric services to demonstrate that they are “managerially, financially, and technically fit and capable of performing the service it intends to provide” and “managerially, financially, and technically fit and capable of complying with all applicable commission rules and orders.” The rule also requires the applicant to be “able to provide reasonable financial assurances sufficient to protect electric distribution utility companies and the customers from default.”

It should be quite concerning to regulators that FirstEnergy Advisors will be managed and controlled by the same executives who manage and control FirstEnergy's regulated utilities.⁷ FirstEnergy Advisors also plans to do business under the "FirstEnergy" name. That approach could cause customer confusion and give FirstEnergy Advisors an unfair competitive advantage over other competitive brokers and aggregators, in violation of the PUCO's rules.⁸

The PUCO-approved auditor, in the FirstEnergy Utilities' corporate separation audit case, recommended against the use of the "FirstEnergy" name in providing competitive services.⁹ The auditor concluded that allowing FirstEnergy competitive affiliates to do business under the "FirstEnergy" name "implies an endorsement by the FirstEnergy Ohio Companies."¹⁰ The auditor found that preventing FirstEnergy Utilities' affiliates from using the FirstEnergy brand name would help "eliminate affiliate bias."¹¹ Contrarily, FirstEnergy Advisors is using the FirstEnergy name and FirstEnergy logo.

The one-page PUCO Staff Report and the Supplemental Application¹² filed by FirstEnergy Advisors fail to alleviate the concerns under law and rule. Moreover, intervenors were precluded from supporting their positions with more information than what FirstEnergy Advisors filed, because FirstEnergy Advisors declined to answer discovery and the PUCO allowed that. It also is not known what, if any, additional information FirstEnergy Advisors

⁷ See Joint Motion to Suspend FirstEnergy Advisors' Certification Application and Joint Motion for Hearing by NOPEC and OCC (Feb. 10, 2020) ("NOPEC/OCC Joint Motion") at 1-2, 10-15.

⁸ *Id.* at 2, 15-17.

⁹ See *In the Matter of the Review of The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC ("Audit Case"), 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") at 98.

¹⁰ *Id.*

¹¹ *Id.* at 46.

¹² See Supplemental Application.

provided to the PUCO Staff. Instead, FirstEnergy Advisors seems intent on keeping secret relevant details regarding how it will provide service to Ohioans.¹³

Despite the serious deficiencies in the Application as supplemented, the PUCO approved the Application, without allowing discovery on FirstEnergy Advisors, without holding a hearing and without awaiting the outcome of the Audit Case investigation of the FirstEnergy Utilities' corporate separation that has been pending at the PUCO for over three years.

The PUCO denied the intervening parties due process and gave FirstEnergy Advisors the benefit of that constraint on parties. The PUCO should have rejected the Application outright or allowed the parties the opportunity to conduct discovery and participate in an evidentiary hearing or held its decision in abeyance pending the outcome of the FirstEnergy Utilities' Audit Case.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by failing to find that FirstEnergy Advisors' Application (as supplemented) violates R.C. 4928.08(B) and Ohio Adm. Code 4901:1-24-10(C), and therefore it should be denied.

Ohio law requires regulated electric distribution utilities to maintain full separation from competitive affiliates, to protect consumers from subsidizing any affiliate's unregulated activities.¹⁴ To confirm adherence with affiliate restrictions and to prevent the abuses of market power, a regulated utility must create, file, and implement a PUCO-approved corporate separation plan in order to offer both noncompetitive retail electric service and a competitive retail electric service ("CRES"), including through affiliates.¹⁵ These corporate separation plans

¹³ See OCC's letter regarding FirstEnergy Advisors' Motion for Protective order where OCC explains that FirstEnergy Advisors requested a broad exemption from the discovery rules. OCC Letter (April 1, 2020) at 1 and n.1 (citing FirstEnergy Advisors' Motion for Protective Order).

¹⁴ R.C. 4928.02(H).

¹⁵ R.C. 4928.17(A).

must meet a minimum content threshold.¹⁶ Additionally, in order to obtain certification to provide competitive electric retail services, a CRES application must provide sufficient information to enable the PUCO to assess an applicant's managerial, financial, and technical capability to provide the service it intends to offer and its ability to comply with PUCO rules and orders adopted under Chapter 4928 of the Revised Code, including adherence to corporate separation rules and law.¹⁷

In a case pending since 2017, the PUCO is reviewing FirstEnergy Advisors' affiliated regulated utilities' current corporate separation plan.¹⁸ In that case, the PUCO retained an independent auditor to review the corporate separation plan. In 2018, the PUCO auditor criticized the FirstEnergy Utilities' co-mingling of senior officers of regulated and non-regulated affiliates and recommended changes.¹⁹ The PUCO auditor also criticized the use of the "FirstEnergy" name by the utilities' non-regulated affiliate, and recommended that the non-regulated affiliate use a name that does not contain the "FirstEnergy" name or any name implying a connection to the FirstEnergy Utilities.²⁰

Despite that pending case, FirstEnergy Advisors failed to prove that its operational plan adequately addresses corporate separation requirements. The Supplemental Application vaguely promises to prevent FirstEnergy Advisors from accessing information not available to

¹⁶ Ohio Adm. Code 4901:1-37-05.

¹⁷ Ohio Adm. Code 4901-1-24-05.

¹⁸ *See* Audit Case.

¹⁹ Audit Case, Audit Report at 39. *See, also*, NOPEC's Response to Supplemented Application and Staff Recommendation (April 14, 2020) ("NOPEC's Response") at 2-4; RESA Motion to Intervene (March 17, 2020) ("RESA Motion") at 3, 13-14.

²⁰ Audit Report, at 98-99; *See also, e.g.*, NOPEC/OCC Joint Motion at 4-5; RESA Motion at 3, 7-8. IGS Motion to Intervene and Establish a Procedural Schedule (March 25, 2020) ("IGS Motion") at 8-9.

nonaffiliated competitors, by limiting employee access to information.²¹ However, just a few sentences later, FirstEnergy Advisors admits that its corporate structure will include “shared representatives and/or employees” who will have access to that exact information.²² To deal with this fact, FirstEnergy Advisors merely states an intent to conduct employee training and to disclose this corporate structure to clients.²³

However, the Supplemental Application makes no attempt to explain how FirstEnergy Advisors plans to stop the flow of information between shared employees. Not does it explain how each of the same executives will be able individually to manage and control the information that each knows about both FirstEnergy Advisors and the affiliated regulated utilities. Additionally, the disclaimer featured in the Supplemental Application fails to lessen the anticompetitive concerns surrounding the use of the “FirstEnergy” name noted by the Auditor.²⁴ In fact, the disclaimer only serves to elevate these concerns, by emphasizing that FirstEnergy Advisors is a subsidiary of FirstEnergy Corp.²⁵

Finally, rather than address the shortcomings of FirstEnergy Advisors’ Application and Supplemental Application, the Staff Report only highlights their deficiencies. The single-page Staff Report notes that FirstEnergy Advisors “has stated that it intends to comply with all commission rules.”²⁶ It’s easy for an applicant to show merely an intent to comply. But an applicant must demonstrate “an ability to comply.”²⁷ FirstEnergy Advisors has failed to show

²¹ Supplemental Application at 3.

²² *Id.*

²³ *Id.* at 3-4.

²⁴ *See* Audit Case, Audit Report at 98.

²⁵ Supplemental Application at 4.

²⁶ Staff Report.

²⁷ Ohio Adm. Code 4901-1-24-05.

specifically how it will comply with the applicable corporate separation rules, orders, and law while maintaining a shared corporate structure, comingled assets and competitively sensitive information, and the FirstEnergy name.

Based upon the information filed in the Application, as supplemented, the Application on its face violates Ohio law and fails to satisfy Ohio Adm. Code 4901:1-24-10. FirstEnergy Advisors has failed to demonstrate that it satisfies the certification requirements to become a CRES provider. It failed to show that it is managerially, technically, and financially capable to perform the services it intends to provide. It failed to show it will comply with applicable PUCO rules and orders. And it failed to show it has financial assurances sufficient to protect the distribution utility and customers from default as required in Ohio Adm. Code 4901:1-24-10(C) and R.C. 4928.08(B).

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by denying the discovery, which intervenors are entitled to conduct (in violation of R.C. 4903.082, Ohio Adm. Code 4901-1-16(A) and Ohio Adm. Code 4901-1-17(A)), by failing to hold a hearing, and by failing to afford due process to intervenors. The Application should be denied.

As requested in OCC and NOPEC's Joint Motion to Suspend²⁸ and as requested by other intervening parties, the PUCO should have adopted a procedural schedule that allowed for the full development of a factual record for the benefit of the PUCO's decision-making. That schedule should have included conducting a hearing on whether FirstEnergy Advisors possesses the managerial, financial and technical capability to provide service and complies with Ohio law, rules, and orders. Parties should have had the opportunity to conduct discovery on the issues raised in the Application, as supplemented, and to provide testimony and evidence demonstrating

²⁸ See NOPEC/OCC Joint Motion.

how the Application does not satisfy Ohio law or the PUCO's rules for certification to operate in the state of Ohio.

OCC and NOPEC requested an evidentiary hearing on February 10, 2020 and February 25, 2020.²⁹ NOPEC again requested a hearing on April 14, 2020.³⁰ Vistra requested a hearing on February 11, 2020, April 1, 2020, April 14, 2020.³¹ The Northwest Ohio Aggregation Coalition requested a hearing on February 17, 2020,³² and Interstate Gas Supply, Inc. requested a hearing on March 25, 2020.³³ The PUCO denied these requests.

Under Ohio Adm. Code 4901:1-24-10(A)(2)(c), the PUCO should conduct a hearing on the suspended application with a schedule that provides ample opportunity to conduct discovery. Further, the schedule should allow for appropriate due process in this case by allowing discovery to be conducted as required by R.C. 4903.082,³⁴ testimony to be filed, and a public hearing to be held to develop a complete record that will assist the PUCO in a full and fair consideration of the Application.³⁵ The PUCO routinely relies on testimony in contested cases and a hearing is an important part of any contested matter before the PUCO.

²⁹ NOPEC/OCC Joint Motion at 2, 5, 17; NOPEC-OCC Reply to FirstEnergy Advisors' Memorandum Contra the NOPEC-OCC Motions to Suspend the Certification Application and for a Hearing (February 25, 2020) at 2, 12.

³⁰ NOPEC Response to Supplemented Application and Staff Recommendation (April 14, 2020) at 4, 12.

³¹ Vistra's Motion to Suspend, Motion to Deny or Suspend, Application, Motion for Expedited Treatment (February 11, 2020) at 7; Vistra's Memorandum in Support of Interstate Gas Supply, Inc.'s Request to Establish Procedural Schedule (April 1, 2020) at 1; Vistra's Response at 2, 8.

³² Motion by the Northwest Ohio Aggregation Coalition to Intervene and Motion to Hold a Hearing in this Matter (February 2, 2020).

³³ IGS Motion at 7.

³⁴ See R.C. 4903.82 ("All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.")

³⁵ See R.C. 4903.09 (providing that the PUCO must include "a transcript of all testimony" in its written opinion in a contested case); see also Ohio Adm. Code 4901:1-27-10(A)(2)(c).

The PUCO's rules and Ohio law permit ample discovery in PUCO proceedings.³⁶ Ohio Adm. Code 4901-1-16(H) plainly allows discovery to begin upon the filing of a motion to intervene, even before it is granted. Ohio Adm. Code 4901-1-17(A) further provides that "discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible." But in this case, FirstEnergy Advisors simply refused all requests for discovery by the parties.³⁷ In a recent PUCO certification case, the PUCO correctly acknowledged that, under the PUCO's rules, parties have a right to discovery (which begins as soon as a motion to intervene is filed) in certification cases.³⁸ And, in that certification case, the PUCO directed the applicant requesting CRES certification to respond to discovery.³⁹

Similarly, in the instant case, the PUCO should have afforded parties ample rights to discovery to allow the parties to produce evidence regarding FirstEnergy Advisors' ability to comply with corporate separation rules and Ohio law.⁴⁰ Without an opportunity to conduct discovery and present their case at a hearing and be heard, the parties were unable to fully develop a record in this contested case for the PUCO to rely upon. Additionally, the Staff Report⁴¹ did little to add to the record, and instead summarily accepts the limited information put forth in FirstEnergy Advisors' Supplemental Application.⁴²

³⁶ R.C. 4903.082, Ohio Adm. Code 4901-1-16(A), Ohio Adm. Code 4901-1-16(B).

³⁷ See OCC's Motion to Compel FirstEnergy Advisors to Respond to OCC's First Set of Discovery, (April 17, 2020).

³⁸ *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Services Supplier, et al.*, Case Nos. 11-5886-EL-CRS and 13-2164-GA-CRS, Entry (March 3, 2020) at ¶13.

³⁹ *Id.*

⁴⁰ See *Ohio Consumers' Counsel v. PUC* (2006) 111 Ohio St.3d 300, 320-22 (finding that the PUCO erred in denying OCC's motion to compel discovery and finding that Ohio law allows broad and ample discovery rights).

⁴¹ See Staff Report.

⁴² See Supplemental Application.

The PUCO has long held that it is in the public interest for it “to base its decisions on as full and complete a record as possible.”⁴³ Accordingly, FirstEnergy’s Application should have been subject to a full hearing where all parties offered testimony and cross-examined witnesses regarding the Application. Such a hearing would have allowed due process for the parties and resulted in the development of a record upon which the PUCO should base its decision.

ASSIGNMENT OF ERROR NO. 3: The PUCO’s decision approving the Application is unlawful and is unsupported by record evidence in violation of R.C. 4903.09. The Application should be denied.

Eight parties intervened in this proceeding to raise questions regarding FirstEnergy Advisors’ Application. There is no question that this proceeding is a “contested case” for purposes of R.C. 4903.09. R.C. 4901.09 expressly states:

In all contested cases heard by the public utilities commission, a complete record of all the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact. (emphasis added).

Despite the numerous requests for a hearing in this contested case, the PUCO refused to conduct a hearing to develop a record on which to base its decision, as required by R.C. 4903.09.⁴⁴

As noted above, the PUCO denied the opposing parties an opportunity to conduct discovery and an evidentiary hearing. Thus, there is no evidentiary record in this contested case to support the PUCO’s determination that FirstEnergy Advisors has the managerial capability to provide service to Ohio consumers as required by R.C. 4928.08(B) and Ohio Adm. Code 4901:1-24-10(C)(2). Instead, the PUCO relied solely on Staff’s one-page recommendation, which also

⁴³ *In the Matter of the Application of Columbus & Southern Ohio Elec. Co. for Auth. to Amend & to Increase Certain of Its Rates & Charges for Elec. Serv., in the Matter of the Application of Columbus & Southern Ohio Elec. Co. for Auth. to Amend & to Increase Certain of Its Rates & Charges for Elec. Serv. in Various Municipalities in Franklin Cty., Ohio.*, 1976 WL 408123, *2, Case No. 74-760-EL-AIR, Interim Order (May 27, 1976).

⁴⁴ Order at 7.

contained no factual determinations to support the Application. For this additional reason, the PUCO should grant rehearing and deny the Application.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by failing to render a decision in this case on the inseparable issues pending in its audit of the FirstEnergy Utilities’ corporate separation, Case No. 17-974-EL-UNC. Alternatively, the PUCO erred by failing to hold its decision in abeyance in this case until it fulfills its intention to render a decision in the audit case, No. 17-974-EL-UNC. FirstEnergy Advisors’ Application should be denied or held in abeyance pending due process and a decision in the audit case.

As explained previously, an application for certification as a CRES provider requires that the applicant demonstrate an “ability to comply with [PUCO] rules or orders adopted under Chapter 4928 of the Revised Code.”⁴⁵ Ohio law requires regulated electric distribution utilities to be fully separated from competitive affiliates to protect consumers from subsidizing any affiliate’s unregulated activities.⁴⁶ To maintain adherence with affiliate restrictions and to prevent the abuses of market power, R.C. 4928.17(A) requires regulated utilities to create, file, and implement corporate separation plans approved by the PUCO.

FirstEnergy Advisors’ affiliated regulated utilities filed two corporate separation plans; the latest one was approved in 2010.⁴⁷ In order to verify compliance with Ohio Adm. Code 4901:1-37 and R.C. 4928.17, the PUCO conducts audit cases reviewing the corporate separation plans of regulated utilities and their nonregulated CRES affiliates.⁴⁸ As discussed above, a separate Audit Case concerning the corporate separation between the FirstEnergy Utilities and

⁴⁵ Ohio Adm. Code 4901:1-24-05(A).

⁴⁶ R.C. 4928.02(H).

⁴⁷ See *In re FirstEnergy*, Case No. 99-1212-EL-ETP, Opinion and Order (July 19, 2000); *In re FirstEnergy*, Case No. 10-388-EL-SSO, Opinion and Order (August 27, 2010) at 16, 27, approving the Corporate Separation Plan filed in Case No. 09-462-EL-UNC.

⁴⁸ Audit Case, Entry (May 17, 2017) at ¶4.

various affiliates is currently pending before the PUCO.⁴⁹ In that case, the auditor raised specific concerns regarding the use of the FirstEnergy name and the shared corporate structure between regulated utilities and their nonregulated affiliates.⁵⁰ To protect the public interest and to establish a level playing field for competitors to benefit consumers, it is imperative that the PUCO eliminate any affiliate abuses that have occurred, are currently occurring, and may occur in the future.

In its Order approving FirstEnergy Advisors' Application, the PUCO stated that "issues regarding [FirstEnergy Advisors'] use of the trade name and compliance with corporate separation requirements by FirstEnergy Corp. affiliates are best raised in" the Audit Case.⁵¹ The PUCO notes that these concerns are "essential elements" of the Audit Report, and must be fully addressed in the Audit Case.⁵²

However, the fact that these corporate separation issues are essential elements of the Audit Case does not make them any less determinative in the instant case. As noted above, a successful certification application requires the applicant to demonstrate compliance with all applicable PUCO rules, orders, and Ohio laws, including compliance with the PUCO's corporate separation rules and Ohio law. Simply put, if the PUCO finds that FirstEnergy Utilities' corporate separation plan fails to meet applicable standards in the Audit Case, then FirstEnergy Advisors' Application also fails as a matter of law.

Enforcing the corporate separation laws and rules and/or strengthening the FirstEnergy Utilities' corporate separation plan is particularly important with regard to the sharing or co-

⁴⁹ *Id.*

⁵⁰ Audit Case, Audit Report at 39, 98-99.

⁵¹ Order at 6.

⁵² *Id.*

mingling of senior management (and the competitively sensitive information possessed) in the instant case. Neither the FirstEnergy Utilities nor FirstEnergy Advisors explain how the same managers who run the regulated utilities and unregulated competitive affiliate, FirstEnergy Advisors, can separate their knowledge of the regulated business, operations, and market information from their knowledge of the affiliate's business, operations, and market information. In fact, it is clear that real separation cannot occur to protect competitive markets. The corporate separation law and rules need to be enforced to protect captive customers from subsidizing competitive affiliates and to make sure that FirstEnergy is not providing an affiliated CRES provider an unfair preference. Allowing FirstEnergy Advisors to use the "FirstEnergy" brand offers that unfair advantage, as noted by the auditor.⁵³

Therefore, if the PUCO finds that these issues are best addressed in the Audit Case, then approving FirstEnergy Advisors' Application in the instant case proves premature. Instead, the PUCO should refrain from entering a decision in this case until a review of the FirstEnergy Utilities' corporate separation plan is complete. As explained previously, a finding in the Audit Case that the corporate separation plan fails to comply with PUCO rules, orders, and Ohio law would mean that FirstEnergy Advisors' Application also fails. If the PUCO chooses not to fully address corporate separation issues in the instant case, then waiting for the outcome of the Audit Case will allow the PUCO to establish the appropriate guidelines for the interactions between the regulated FirstEnergy Utilities and its affiliate, FirstEnergy Advisors. Setting such guidelines prior to FirstEnergy Advisors receiving a certificate to operate and begin operations will provide needed assurance that customers can likely be protected from market power abuses as outlined in the Audit Report.

⁵³ Audit Case, Audit Report at 98.

III. CONCLUSION

For the reasons stated, FirstEnergy Advisors failed to carry its burden to prove it merits a certificate to operate under applicable law and rule. The PUCO's decision violates law relating to the discovery rights of OCC and other parties, violates law regarding the standards for granting a certificate and violates law regarding the standards for corporate separation between an entity claiming competitive status (FirstEnergy Advisors) and its monopoly utility affiliates (FirstEnergy Utilities). All of these violations abdicate consumer protection by the state from this affiliate of the FirstEnergy monopoly utilities that can impair fair competition despite its claims otherwise.

Therefore, under R.C. 4903.10(B) the PUCO should abrogate its decision granting the Application of FirstEnergy Advisors, or conduct a hearing process and then modify its decision by prohibiting (among other things) the structure of FirstEnergy Advisors that is in violation of corporate separation standards, or hold its decision in abeyance pending due process and its stated intention to decide the corporate separation issues in Case No. 17-974-EL-UNC that are applicable here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served via electronic transmission upon the parties this 22nd day of May 2020.

/s/ Kimberly W. Bojko
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Special Counsel for OCC

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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