BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm.Code Chapter 4901:1-37	**))))))**	**Case No. 17-0974-EL-UNC**

INITIAL COMMENTS OF VISTRA ENERGY CORP.

I. INTRODUCTION

In accordance with the attorney examiner's September 17, 2021 Entry, Vistra Corp. ("Vistra") submits initial comments on the corporate separation audit report of Daymark Energy Advisors, Inc. ("Daymark") filed on September 13, 2021.[1] The purpose of Daymark's audit was to audit and verify Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's (collectively, "FirstEnergy" or the "regulated utilities") compliance with Ohio's corporate separation laws and rules, Ohio Revised Code ("ORC") 4928.17 and Ohio Administrative Code ("OAC") Chapter 4901:1-37.

It is apparent from the audit report that FirstEnergy has declined to voluntarily bring its operations and corporate structure, particularly with respect to affiliates, into compliance with such laws and rules. The audit report identified several unfair competitive advantages and cross-subsidies, related to marketing and branding of non-electric products and services and cost

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[1] Vistra previously filed supplemental comments on the audit report of SAGE Management Consultants, LLC filed in this case on May 14, 2018. Vistra's involvement in these matters started in Case No. 20-0103-EL-AGG, where Vistra was granted status as an intervenor. Vistra's supplemental comments in this case (Case No. 17-0974-EL-UNC) were filed after the Commission issued its Finding and Order in Case No. 20-0103-EL-AGG stating: "Vistra questions the sufficiency of the FirstEnergy Utilities' corporate separation plan and cost allocation manual; however, the review of the corporate separation plan and the cost allocation manual are, in fact, essential elements of the corporate separation audit report, and should be addressed in that proceeding." ¶ 20.

allocation, that FirstEnergy has extended to its competitive affiliates and that were first identified as issues in the 2018 audit report prepared by Sage Management Consultants, LLC. Such anti-competitive business practices contradict the purposes of Ohio's corporate separation requirements, which are to "create competitive equality, prevent unfair competitive advantage, [and] prohibit the abuse of market power."[2]

As clarified herein, Vistra supports many of the findings and recommendations contained in Daymark's audit report. Vistra appreciates the opportunity to participate in this case and respectfully requests that the Commission:

- Adopt the overall recommendation for FirstEnergy to build a more robust and effective compliance plan solely focused on Ohio's corporate separation requirements (p. 11). FirstEnergy should then be required to submit proof to the Commission as necessary to show that the recommended actions were taken to materially update and improve its corporate separation compliance plan.

- Adopt the recommendation for Suvon, LLC ("Suvon"), including FirstEnergy Advisors and FirstEnergy Home, to be separated into their own organization within FirstEnergy and to not be considered part of FirstEnergy Service Company ("FESC") (p. 12). Vistra also generally supports the other recommendations regarding products and services (pp. 12-13), except for the recommendation that a profit-sharing mechanism be adopted.

- Adopt the recommendation for FirstEnergy Products ("FEP") to remove the regulated utilities' names and logos from its marketing materials and activities (p. 13).

- Adopt the recommendations to address the deficiencies in FirstEnergy's Cost Allocation Manual ("CAM") (pp. 13-14). FirstEnergy should then be required to submit proof to the Commission as necessary to show that the recommended actions were taken to materially update and improve its CAM.

Vistra discusses each of these recommendations in further detail in these initial comments. To ensure that these findings are addressed in a proper procedural manner, Vistra suggests that the Commission order FirstEnergy to (1) show cause why these findings should not be adopted by the

[2] OAC 4901:1-37-02(B).

Commission and (2) provide amended copies of the corporate separation compliance plan and CAM that comply with OAC Chapter 4901:1-37.

II. INITIAL COMMENTS

A. FirstEnergy's provision of non-electric products and services (through FEP and its related business practices) are anti-competitive, and FirstEnergy should cease offering non-electric products and services through FEP.

FirstEnergy is allowed to offer non-electric products and services via a Commission-approved tariff.[3] Such products and services include "tree service, electrical service, landscape lighting, home insulation, security lighting, surge protection, exterior and interior line protection, low voltage wiring protection, exterior water line protection, exterior sewer/septic line protection, water heater repair, heating/cooling system repair, exterior/interior gas line production, and connections mover services."[4] FirstEnergy offers these products and services to its regulated utility customers via FEP.[5]

As an initial matter, FirstEnergy's provision of non-electric products and services through FEP violates ORC 4928.17(A)(1), which requires non-electric products and services to be provided "through a fully separated affiliate of the utility." FEP is not a fully separated affiliate of FirstEnergy. Rather, FEP is part of FESC, which performs shared corporate services (e.g., FirstEnergy upper management, accounting, IT, human resources, planning, engineering, customer service, and tree trimming) for all of FirstEnergy's affiliates, including the regulated utilities.[6]

FEP also markets these products and services using the regulated utilities' channels (e.g., websites, soft transfers, and email or mail) and reputations (e.g., the regulated utilities' names and

[3] Daymark audit report at 68.
[4] *Id.* at 58-59.
[5] *Id.* at 57.
[6] *Id.* at 27, 35.

logos).[7] Daymark found, and Vistra agrees, that FirstEnergy's use of the regulated utilities' channels and reputations to market FEP's products and services is an unfair competitive advantage for FirstEnergy's affiliates because it provides them with "captive utility customers" to market to with minimal added investment.[8] Competitors, such as Vistra, who offer similar non-electric products and services do not have the same opportunity to market to a captive audience, making it impossible to compete in this space.

This problem is highlighted by FirstEnergy's use of soft transfers. Soft transfers occur when a regulated utility customer calls for a customer service-related issue and then is transferred to the FEP group to learn about product and service offerings.[9] For example, "FirstEnergy has a Connections Program that offers Surge Assist and HomeServe Exterior Electrical Line Protection for eligible customers when they call for move-in services. Customers can also be directly transferred to third parties for services such as cable, internet, phone, home security, and a money saving Saver's Program with coupons to major retailers."[10] Again, competitors, such as Vistra, offering similar products and services "do not have access to this opportunity to gain customers through electric utility customer service calls."[11] Therefore, this practice presents an unfair competitive advantage to FirstEnergy's affiliates, effectively hindering competition in the provision of non-electric products and services to customers.

Finally, Daymark found that FirstEnergy collects the majority of FEP revenue through regulated utility customers' electricity bills.[12] This is yet another unfair competitive advantage for FirstEnergy's affiliates, as competitors, such as Vistra, cannot offer the convenience of a

[7] *Id.* at 68.
[8] *Id.* at 68-69.
[9] Daymark audit report at 63.
[10] *Id.* at 63-64.
[11] *Id.* at 69.
[12] *Id.*

consolidated utility bill to invoice and collect for non-electric products and services provided to customers.[13]

Interestingly, despite raising the above concerns, Daymark's recommendations fail to address them. Instead, Daymark focuses on the fact that although regulated utility customers provide FEP with a market for their products and services, and FEP revenue is collected through regulated utility customers' electricity bills, regulated utility customers receive no financial benefit because FEP revenue is not credited in any way to customers of the regulated utility.[14] Daymark then recommends a profit-sharing mechanism be adopted to allow regulated utility customers to benefit from having their regulated utility associated with FEP and allowing FirstEnergy's affiliates access to the regulated utility customer billing system.[15]

Vistra disagrees with this recommendation. First, it fails to address the anti-competitive nature of FirstEnergy's provision of non-electric products and services through FEP and its related business practices, as detailed above. The recommendation does nothing to even out the playing field for competitors, such as Vistra, and preserves the structures that make competing in the provision of non-electric products and services impossible. Further, the recommendation as proposed raises anti-competitive and further financing ring-fencing concerns. Competitors, such as Vistra, do not have access to FirstEnergy's regulated utility customer billing system for marketing purposes. Accordingly, FirstEnergy's affiliates should not have access, unless competitors also have full access. Rather than adopting a profit-sharing mechanism, FirstEnergy should cease offering non-electric products and services through FEP.

[13] *Id.*
[14] *Id.* at 71.
[15] Daymark audit report at 71.

B. FESC's performance of shared corporate services for FirstEnergy's competitive affiliates, including Suvon,[16] results in cross-subsidization, and these competitive affiliates should be separated from FESC.

FirstEnergy's regulated utilities and competitive affiliates receive shared corporate services through FESC.[17] These shared services include "providing call centers, customer service, economic development, transmission and distribution technical services, workforce development, administrative services, communications, corporate affairs and community involvement, corporate services, human resources, IT, industrial relations, real estate, technology and support services, performance planning, supply chain, controllers and finance, credit management, risk management, insurance services, internal audit, investment management, investor relations, rates and regulatory affairs, treasury, business development, governmental affairs, legal assistance, and claims."[18]

Daymark noted two areas of possible cross-subsidization, both of which are implicated by FESC providing shared corporate services to FirstEnergy's competitive affiliates:

- The competitive FirstEnergy companies having access to information that non-FirstEnergy competitive suppliers do not have access to.
- The competitive FirstEnergy companies having some of their costs subsidized by the rest of the company, especially the regulated utilities, in ways that enhance their competitiveness.[19]

First, shared service employees may be a conduit to transfer sensitive information between regulated utility employees and competitive affiliate employees. While FirstEnergy has developed certain physical and IT barriers to prevent this from occurring, those barriers rely heavily on human

[16] Vistra acknowledges that on November 3, 2021, the Commission granted Suvon's Motion to Withdraw the Certification Application of Suvon, LLC d/b/a FirstEnergy Advisors as a Competitive Retail Electric Service Power Broker and Aggregator ("Motion to Withdraw"). In that Motion to Withdraw, however, Suvon stated its intent to refile an application again "in the near future." Motion to Withdraw at 6. Further, the issues raised herein are not unique to the FirstEnergy affiliate Suvon, LLC d/b/a FirstEnergy Advisors.
[17] *Id.* at 35.
[18] *Id.* at 27.
[19] *Id.* at 33-34.

judgment for compliance, and any efforts (e.g., audits, spot checks) to reinforce employee compliance are non-existent.[20] It is also not apparent how shared service employees, with knowledge of both the regulated utilities and the competitive affiliates, can prevent their knowledge in one arena from influencing their decision-making (either intentionally or unintentionally) in the other arena.

Daymark highlighted such concerns in its discussion of the relationship between FEP and Suvon. According to Daymark, "Suvon is spread throughout FirstEnergy's corporate structure. Although on FirstEnergy's affiliate organizational chart, Suvon appears as a separate affiliate, Suvon employees are actually all [FESC] employees and therefore not a separate affiliate."[21] This has resulted in confusion among FirstEnergy employees about who works for the competitive business, increasing the risk of inadvertent sharing of information.[22]

Further, Suvon d/b/a FirstEnergy Home is FirstEnergy's unregulated channel for selling non-electric products and services.[23] FirstEnergy Home offers the same products and services as FEP (FirstEnergy's regulated channel), and both business units share back-office functions and employees through FEP Operations, which is a part of FESC.[24] According to Daymark, "If the same staff support both regulated (FEP) and unregulated (FirstEnergy Home) services, it is challenging to maintain a 'mental barrier' and keep confidential customer information set aside while providing support to an unregulated affiliate."[25] Further, the Director of FEP Operations reports directly to the VP of Sales, who is a market-function FESC employee assigned to support

[20] *Id.* at 39, 46.
[21] *Id.* at 70.
[22] Daymark audit report at 70-71.
[23] *Id.* at 67
[24] *Id.*
[25] *Id.* at 10.

Suvon d/b/a FirstEnergy Advisors.[26] The Director of FEP Operations has access to sensitive information and is another potential conduit.[27]

It is also apparent that costs incurred by FirstEnergy's competitive affiliates are subsidized by the Ohio customers of the regulated utilities through FESC. As previously discussed, FEP (regulated) and FirstEnergy Home (unregulated) share the same internal resources through FESC. Daymark found that "[t]here is a risk of FirstEnergy Home sharing resources with FEP that are ultimately financed or coming from [the regulated utilities]." This risk is heightened by the fact that FirstEnergy's CAM "lacks enough internal controls and oversight regarding the use of cost allocators and cost allocated to [the regulated utilities] to prevent cross-subsidization."[28]

The cross-subsidization described above, including the sharing of sensitive information and costs between FirstEnergy's regulated utilities and competitive affiliates, is expressly prohibited by Ohio's corporate separation rules.[29] FirstEnergy has not met its burden of demonstrating compliance with such rules (or even capability of compliance with such rules). Accordingly, Vistra supports Daymark's recommendations to address cross-subsidization, specifically separating Suvon, including FirstEnergy Home and FirstEnergy Advisors, into their own organization within FirstEnergy and not considering them part of FESC.

C. FEP's use of the regulated utilities' names and logos to market its products and services confers an unfair competitive advantage, and FEP should cease such use.

FirstEnergy's marketing of FEP products and services capitalizes on the reputation of the regulated utilities. FEP merely adds "Services" to the regulated utilities' names and logos to

[26] *Id.* at 70.
[27] *Id.*
[28] Daymark audit report at 90.
[29] OAC 4901:1-37-04(A)(2)-(4) and (D)(6).

market non-electric products and services.[30] While FirstEnergy believes that this addition provides enough information for customers to distinguish between the entity offering products and services and their regulated utility, Daymark found that "[a] customer could reasonably assume that [FEP], while using their utility's name, was also their utility."[31] FirstEnergy also includes a tab for "Products," which advertises, "We can bring you more than just electricity. Check out our other offerings below," linking to products and offerings from the non-regulated affiliates, on each of its regulated utilities' websites.[32] As with the use of the regulated utilities' names and logos, the website language and layout "could make it appear to the customer that non-electric services and goods are being offered by the regulated utility."[33] FirstEnergy does provide a disclaimer, but Daymark found it "so small the customer is unlikely to read it."[34]

Once again, FirstEnergy's marketing and branding raises anti-competitive concerns.[35] Such marketing and branding allows FEP to benefit from affiliate bias, contradicting the purpose of Ohio's corporate separation rules, which is to "require all of the state's electric utilities to meet the same standards so a competitive advantage is not gained solely because of corporate affiliation" and to "prohibit the abuse of market power."[36] Any success of FEP in the competitive products and services market is likely related to FEP's use of the regulated utilities' names and logos, and the implied endorsement by the regulated utilities. Further, such use, especially given FirstEnergy's minimal efforts to eliminate affiliate bias, means it is impossible to not make a connection between the regulated utilities and FEP. Accordingly, Vistra supports Daymark's

[30] Daymark audit report at 72.
[31] *Id.* at 73.
[32] *Id.* at 66.
[33] *Id.*
[34] *Id.* at 73.
[35] In several filings in Case No. 20-0103-EL-AGG, and in supplemental comments previously filed in this case, Vistra raised similar anti-competitive concerns related to use of the "FirstEnergy" name by FirstEnergy's competitive affiliates, including Suvon.
[36] OAC 4901:1-37-02.

recommendation for FEP to remove the regulated utilities' names and logos from their marketing materials and activities.

D. FirstEnergy's corporate separation compliance plan and CAM require material updating, improvement, and verifiable enforcement.

As an initial matter, FirstEnergy's corporate separation compliance plan is deficient. FirstEnergy focuses only on areas of commonality between FERC compliance and Ohio compliance, intentionally ignoring several Ohio corporate separation rules.[37] Daymark's gap analysis between FERC rules and Ohio rules found that outside of OAC 4901:1-37 Section 04, almost no overlap existed between the FERC rules and Ohio rules. Specifically, the compliance gaps identified include Section 04(A)(6) (rebuttable presumption), Section 04(B) (separate accounting), Section 04(C) (financial arrangements), Section 08 (CAM), and several code of conduct requirements, including Section 04(D)(2) (provision of customer lists), Section 04(D)(5) (disallowance of conditional service), Section 04(D)(7) (provision of supplier lists to customers), Section 04(D)(8) (fair business practices), and Section 04(D)(11) (disclosure of representation).[38] Equally troubling is FirstEnergy's lack of action taken to address the gaps. According to Daymark, "FirstEnergy has internally discussed this gap between FERC and OAC 4901 requirements. However, FirstEnergy has not taken any action to address this gap. At one point, FirstEnergy endeavored to address the gaps, but the effort was discontinued after a few meetings."[39]

FirstEnergy's CAM is also equally deficient. Although content wise the CAM is generally compliant, except for OAC 4901:1-37-08(D)(5) (job summaries for shared independent contractors) and OAC 901:1-37-08(D)(7) (a log detailing instances of exercised discretion in the application of tariff provisions), processes and systems are not in place to achieve compliance with

[37] Daymark audit report at 31.
[38] *Id.* at 30.
[39] *Id.* at 31.

the CAM. First, Daymark notes that it took FirstEnergy a long time to assemble and deliver all the pieces of the CAM, as they are not fully incorporated into a single document.[40] Second, "the CAM lacks enough internal controls and oversight regarding the use of cost allocators and cost allocated to [the regulated utilities] to prevent cross-subsidization."[41] For example, there is no reinforcement that FESC employees should directly charge their time to a specific affiliate, and there are minimal checks on accurate time entry.[42] Further, during Daymark's audit period, FirstEnergy's Chief Compliance Officer position was vacant, and FirstEnergy could not locate the system and processes in place for compliance while the position was vacant.[43]

FirstEnergy's approach (or lack thereof) to compliance with Ohio's corporate separation requirements is concerning, especially given the risk of cross-subsidization, as previously explained. Of particular concern to Vistra is the lack of internal controls and oversight regarding cost allocation of shared corporate service charges. There is already clear evidence that shared corporate services for FirstEnergy's competitive affiliates are financed through the regulated utilities and collected in rate base. This type of cross-subsidization presents an unfair competitive advantage to FirstEnergy's competitive affiliates who, due to the avoidance of shared corporate service charges, can charge lower rates for electric service. Competitors, such as Vistra, cannot avoid such charges and in turn offer lower rates. Accordingly, Vistra supports Daymark's recommendations to address the deficiencies in FirstEnergy's corporate separation compliance plan and CAM.

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[40] *Id.* at 81.
[41] *Id.* at 90.
[42] *Id.* at 94.
[43] Daymark audit report at 91.

III. CONCLUSION

The Commission should adopt the findings and recommendations of Daymark's audit report, subject to the initial comments contained herein. Further, Vistra respectfully requests that the Commission issue an order (1) for FirstEnergy to show cause why such findings should not be adopted and (2) to require FirstEnergy to file an updated corporate separate compliance plan and CAM.

Respectfully submitted,

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