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 MOTIONS TO SUSPEND FILED BY THE OHIO CONSUMERS' COUNSEL, NOPEC, NOAC, AND VISTRA ENERGY CORP.

I. INTRODUCTION

The arguments raised by the Ohio Consumers' Counsel ("OCC"), Northeast Ohio Public Energy Counsel ("NOPEC"), the Northwest Ohio Aggregation Coalition ("NOAC") and Vistra Energy Corp. ("Vistra") 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 rather than those parties' arbitrary demands. There are no factual disputes. Accordingly, the Commission should follow its well-established precedent, deny the requests for hearing, and grant FirstEnergy Advisors' license application.

II. ARGUMENT

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

OCC/NOPEC claim that because some of the managers of FirstEnergy Advisors are shared service employees this is grounds to deny the Application.[1] NOAC joins this argument and claims a hearing is necessary "to uncover the actual workings of FirstEnergy Advisors and its interactions with FirstEnergy and its regulated subsidiaries."[2] However, OCC/NOPEC never explain why the

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[1] OCC/NOPEC Joint Motion to Suspend and for Hearing ("Joint Motion") at 10–13.
[2] NOAC Motion at 3.

use of shared service employees is improper under Ohio law. This is significant because there is simply no prohibition in Ohio law against using shared service employees. Indeed, Ohio has extensive experience in working with shared service employees who properly allocate their time among different entities. Ohio has adopted OAC 4901:1-37-04(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 OCC/NOPEC have cited nothing in support of their position, this argument should be rejected as a matter of law.

Rather than making a legal argument, OCC/NOPEC claim that FirstEnergy Advisors must show that it is fully separated from its regulated affiliates and that it cannot do so because it uses shared service employees. This is incorrect. FirstEnergy Advisors has already shown it is a separate corporate entity known as Suvon, LLC.[3] The use of shared service employees has nothing to do with this corporate structure. FirstEnergy Advisors is legally separated from its regulated affiliates.

Notably, the same commonality of managers was present when FirstEnergy Solutions ("FES") was the CRES provider for NOPEC. NOPEC never objected to this commonality of managers when it was in a financial arrangement with FES. NOPEC's current objection to this structure therefore appears to be strategic rather than a concern that FirstEnergy Advisors' use of shared service employees is improper under Ohio law. Likewise, FES has served the NOAC communities for years and NOAC never objected to the commonality of managers.

The final argument raised by OCC/NOPEC on this point reveals NOPEC's purpose is actually anti-competitive rather than a true concern of customer confusion. FirstEnergy Advisors

[3] Suvon, LLC d/b/a FirstEnergy Advisors Application, Exhibit A-15.

has identified two former FES employees as officers and directors.[4] NOPEC objects because those two individuals previously worked on FES governmental aggregation programs.[5] Presumably, NOPEC is concerned because FirstEnergy Advisors will provide communities with an experienced broker who can provide customers with options regarding governmental aggregation. Having experienced individuals associated with FirstEnergy Advisors is, however, beneficial to the market because it provides another experienced competitive option for aggregation programs in Ohio.

In fact, brokers are required to show managerial experience and capabilities when applying for a license.[6] Experienced officers and directors are an essential part of that demonstration. NOPEC is simply demonstrating its concern for additional competition by creating arguments that lack support. There is no basis to assume these employees will improperly disclose information they learned in a past job, or that information they learn at FirstEnergy Advisors would somehow be improperly disclosed. There is no reason to suspect these employees will violate confidentiality obligations. Employees changing jobs maintain customer confidences every day.

Whatever the cause for the objection, there is nothing in Ohio law that prohibits FirstEnergy Advisors from having officers and directors with knowledge of Ohio's aggregation programs. FirstEnergy Advisors is very familiar with corporate separation rules and the confidentiality of customer information. Therefore, customer information will not be used inappropriately.

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[4] Application, Ex. A-12.
[5] OCC/NOPEC Motion at 13.
[6] OAC 4901:1-24-05(B)(1)(b).

B. Because FirstEnergy Advisors is a separate entity from the utilities, will operate independently of the utilities, and will comply with all corporate separation rules, there is no violation of R.C. 4928.17(A)(1).

OCC/NOPEC also claim that "FirstEnergy Advisors is not structurally separate from the regulated utilities because of their common control and management," and further claim this to be a violation of R.C. 4928.17(A)(1).[7] Once again, OCC/NOPEC fail to provide any evidence of any purported violations by FirstEnergy Advisors. Contrary to their unsupported claims, FirstEnergy Advisors is a separate entity from the utilities and there are no subsidies from the utilities to FirstEnergy Advisors.

OCC/NOPEC concede that "structurally separate affiliates are permitted to share employees and services" so long as "the employees' activities do not violate the code of conduct per Ohio Admin. Code 4901:1-37-04(D) and are properly accounted for in the cost allocation manual per Ohio Admin. Code 4901:1-37-04(A)(5)."[8] As shown by those admissions, so long as FirstEnergy Advisors complies with those restrictions there is nothing inappropriate about its structure.

OCC/NOPEC present no evidence of any violation of these rules. Instead, OCC/NOPEC simply assume that FirstEnergy Advisors will violate these rules. In fact, they claim that any use of shared service employees "is per se unlawful under Ohio Rev. Code 4928.17(A)(1). It cannot be permitted." Once again, OCC/NOPEC are ignoring 20 years of Ohio precedent and the language of the very rules they cite. Unregulated affiliates (such as the entities associated with regulated utilities discussed *infra*) operated for years without any violation of Ohio's corporate separation rules. Thus, this structure is not "per se unlawful." This history of compliance also

[7] Joint Motion at 13–15.
[8] Joint Motion at 13.

shows that FirstEnergy Corp. was able to operate an unregulated affiliate for almost two decades without any improper disclosure of customer information. As such, there is no reason to suspect that FirstEnergy Advisors' brokerage services would be any different.

Because FirstEnergy Advisors complies with all corporate separation rules, including ensuring that employees properly allocate their time and observe the no-conduit rule strictly so there is no impermissible exchange of utility data, there is no violation of R.C. 4928.17(A)(1).

C. 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.

OCC/NOPEC claim that FirstEnergy Advisors' use of the "FirstEnergy" name violates Ohio Admin. Code 4901:1-37-04(D)(7) and (D)(9), while Vistra claims that its use is misleading in violation of Ohio Admin. Code 4901:1-21-05(C)(10).[9] NOAC's position is less clear, but appears to advocate for a change in name as well.[10] The Commission has repeatedly rejected these arguments and should reject them again here for the same reasons.

OCC/NOPEC support their claim that the use of the "FirstEnergy" name is prohibited under Ohio Admin. Code 4901:1-37-04(D)(7) because, according to them, the use of the name constitutes an "endorsement" under that section. The only support for this interpretation is citations to an audit report which the Commission has not adopted. OCC/NOPEC completely ignore that the Commission has already analyzed and ruled that unregulated entities can use names affiliated with regulated entities.[11] In fact, the Commission held that, "absent other circumstances indicating that the use of the name and/or logo is unfair, misleading, or deceptive," the Commission

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[9] Joint Motion at 15–16; Vistra Motion at 4–5.
[10] NOAC Motion at 4.
[11] *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).

did "not believe that an unaffiliated CRES supplier should necessarily be prohibited from using the incumbent utility's name and/or logo."[12] As they have countless times in the past, OCC/NOPEC still fail in their attempts to show that this practice is misleading or deceptive.

Here, there is no evidence that the use of the name violates any Commission Rules—nor do the parties provide any. In fact, 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. As it would be improperly deceptive to fail to disclose this relationship, OCC/NOPEC's argument is not valid. Instead FirstEnergy Advisors will comply with all Commission rules, including the rules that require an affiliate disclaimer[13] and the requirement that employees disclose the entity the employee is representing.[14]

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.[15] 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."[16] Indeed, other Ohio utilities had or have affiliates with similar trade names, including AEP Energy Inc., [17] Duke

[12] *Id.*
[13] OAC 4901:1-21-05(C)(8)(g).
[14] Ohio Admin. Code 4901:1-37-04(D)(11).
[15] *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).
[16] Case No. 12-1924-EL-ORD, AEP Ohio Reply Comments at 2.
[17] Case No. 10-0384-EL-CRS; Case No. 12-1491-GA-CRS.

Energy Retail Sales,[18] Dominion Retail Inc.,[19] and Vectren Retail, LLC.[20] In fact, OCC has claimed that use of a similar name is misleading and deceptive since the year 2000, and specifically made that argument regarding the name FES.[21] If it were truly misleading to use the same name as a regulated utility, the Commission would not have repeatedly approved these names over the last eighteen years.

Vistra claims that the use of the name FirstEnergy Advisors is somehow a violation of the CRES rules because it would "lead a customer to believe that the CRES provider is soliciting on behalf of or is an agent of any entity other than the CRES provider."[22] FirstEnergy Advisors will be acting on behalf of customers by providing brokerage service. There is accordingly no chance of customer confusion or that customers would believe they are being solicited by another entity.

Vistra argues that brokers should use their formal legal name rather than a trade name.[23] This is not the practice in Ohio, which Vistra knows well. One only needs to review the first page of Vistra's own brief where Vistra admits to be operating under fourteen (14) different trade names and "dba's" in Ohio alone. It is difficult to understand how Vistra can object to possible customer confusion associated with not using a formal legal name when it operates under 14 different trade names in Ohio. The Commission should reject Vistra's poorly thought out claims as an attempt to support its load associated with the NOPEC contract rather than any true concern for Ohio customers.

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[18] Case No. 04-1323-EL-CRS.
[19] Case No. 00-1781-EL-CRS; Case No. 02-1757-GA-CRS.
[20] Case No. 11-1078-EL-CRS.
[21] OCC Comments, pp. 3-4 (citing *Exelon et al. v. FirstEnergy Service Corp*., Case No. 00-1862-EL-CSS, OCC Motion to Intervene and Memorandum in Support at 3 (Oct. 30, 2000); *In the Matter of the Application of FirstEnergy Services Corp. for Certification for Retail Generation Providers*, Case No. 00-1742-EL-CRS, OCC Motion to Intervene (Oct. 30, 2000).)
[22] Vistra Motion at 4 (citing OAC 4901:1-21-05(C)(10)).
[23] Vistra p. 4 (arguing that it is improper not to operate as "Suvon, LLC".)

D. Because additional competitors inherently increase competition, Vistra's claim that approving FirstEnergy Advisors' Application would be anticompetitive, is baseless.

Vistra argues that approving FirstEnergy Advisors' Application is anticompetitive and will "result in the exact threat to competition the Commission must prevent," purportedly due to the "competitive advantage" that comes "with the use of the FirstEnergy name."[24] Vistra's argument fails for two reasons. First, it is axiomatic that additional competitors inherently increase competition—which was one reason that served as a basis for Ohio's establishment of retail competition.

Secondly, if use of the "FirstEnergy" name was improperly anticompetitive, then the Commission would not have repeatedly approved similar nomenclature for retail providers with public utility affiliation. The Audit Report did not identify any changed circumstances from when the Commission previously approved FirstEnergy Solutions' name, which raised identical issues. Accordingly, Vistra's argument that approving FirstEnergy Advisors' Application is anticompetitive is baseless.

It is also worthwhile to note that Vistra has been unable to locate any authority in support of its position. Instead, it relies on a case in which a CRES improperly marketed itself by using the same name as the local distribution utility. Vistra then claims that FirstEnergy Advisors could engage in similar conduct.[25] Vistra fails to mention that this could happen with any entity certified by the Commission, including Vistra. That is why the Commission created the corporate separation rules. Vistra's poor attempt to single out FirstEnergy Advisors by citing an irrelevant case

[24] Vistra Motion at 6.
[25] Vistra Motion at 5.

accurately depicts the entirety of its arguments: A number of scenarios could happen, but there is no evidence that such scenarios are likely to happen.

Vistra then creates another strawman that FirstEnergy Advisors "could" be part of a vertically integrated utility.[26] Once again Vistra shows a startling lack of understanding of Ohio's regulatory scheme. FirstEnergy Advisors will be offering brokerage services and does not own generation. Therefore, under no circumstance could this be considered a vertically integrated utility. Even if FirstEnergy Advisors did own generation (which it does not), customers have choice in Ohio and are not forced to accept generation service from their distribution utility. As such, this argument does not make sense.

Finally, Vistra claims that there could be cross subsidization if FirstEnergy Corp. allows use of "existing advertising infrastructure, including websites and customer bills" in violation of R.C. 4928.02(H).[27] Yet again, Vistra illustrates its lack of understanding of Ohio's corporate separation rules. Vistra should be aware of the exhaustive protections in place, including but not limited to the prohibition of cross-subsidies,[28] the requirement to maintain separate accounting,[29] strict financial arrangement requirements,[30] and the code of conduct.[31] FirstEnergy Advisors will comply with each of these requirements, ensuring that the unfounded possibilities Vistra imagines will not occur.

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[26] Vistra Motion, p. 7.
[27] Vistra Motion, p. 7.
[28] OAC 4901:1-37-04(A)(3).
[29] OAC 4901:1-37-04(B).
[30] OAC 4901:1-37-04(C).
[31] OAC 4901:1-37-04(D).

E. The only issue relevant in the instant case is FirstEnergy Advisors' qualification under the Commission application process.

Although the instant case only concerns FirstEnergy Advisors' Application, OCC and NOPEC nonetheless attempt to take a second bite at the apple by exhaustively discussing the corporate separation case, ESP IV, and the 2017 Audit of FirstEnergy Corp.'s Ohio utilities.[32] However, none of these arguments are relevant to, nor appropriate for, this case. The only relevant facts to the instant case are FirstEnergy Advisors' qualifications under the Commission application process. Because the parties have failed to raise any valid arguments concerning FirstEnergy Advisors' Application or the Commission application process, there is simply no basis to warrant suspension of the application process in the instant case.

III. CONCLUSION

Intervenors fail to raise any arguments that warrant the suspension of the application process regarding FirstEnergy Advisors' Application. Accordingly, FirstEnergy Advisors respectfully requests that the Commission deny the parties' motions to set this matter for hearing and approve FirstEnergy Advisors' Application.

[32] *See* Joint Motion at 5–10.

Respectfully submitted,

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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 18th day of February 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Summary: Memorandum In Opposition To Motions To Suspend and For Hearing electronically filed by Mr. Trevor Alexander on behalf of Suvon, LLC