BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Suvon, LLC, d/b/a FirstEnergy Advisors for Certification as an Aggregator and Power Broker	)))	Case No. 20-0103-EL-AGG

REPLY OF VISTRA ENERGY CORP. TO SUVON, LLC'S MEMORANDUM IN OPPOSITION TO THE MOTIONS TO SUSPEND FILED BY THE OHIO CONSUMERS' COUNSEL, NOPEC, NOAC, AND VISTRA ENERGY CORP.

I. INTRODUCTION

Vistra Energy Corp.[1] submits this Reply to the Suvon, LLC d/b/a FirstEnergy Advisors' ("FirstEnergy Advisors") Memorandum in Opposition filed on February 18, 2020. In its Memorandum in Opposition, FirstEnergy Advisors does not provide evidence to rebut the concerns raised in the Motions to Suspend filed by the Ohio Consumers' Counsel ("OCC") jointly with the Northeast Ohio Public Energy Counsel ("NOPEC"), the Northwest Ohio Aggregation Coalition ("NOAC"), and Vistra. Instead FirstEnergy Advisors argues that because they are "familiar" with the various rules,[2] its Application should be approved by the Public Utilities Commission of Ohio ("Commission"). FirstEnergy Advisors then wrongly concludes that "[t]here are no factual disputes" and requests that the Commission certify its Application.

In reaching this conclusion, FirstEnegy Advisors takes two primary positions in its Memorandum in Opposition. FirstEnergy Advisors first argues that because the Commission has

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[1] Vistra Energy Corp.'s retail entities have offices and operations in multiple states, including multiple CRES providers licensed in Ohio. Vistra Energy Corp.'s competitive retail electric service providers in Ohio include Dynegy Energy Services (East), LLC (d/b/a Dynegy; d/b/a Brighten Energy; d/b/a Better Buy Energy; d/b/a True Fit Energy; d/b/a Honor Energy); Ambit Northeast, LLC; Cincinnati Bell Energy, LLC; Energy Services Providers, Inc. d/b/a Ohio Gas & Electric; Everyday Energy, LLC d/b/a Value Power & Gas; Public Power, LLC; TriEagle Energy LP; and Viridian Energy PA LLC (collectively, "Vistra").

[2] Memorandum in Opposition at 3 ("FirstEnergy Advisors is familiar with corporate separation rules and the confidentiality of customer information.").

previously approved applications for competitive retail electric service ("CRES") providers with similar names to parent entities, it should do so here without a hearing or any further proceeding. FirstEnergy Advisors then argues that because there are anti-competitive behavior and consumer protection rules, the existence of these laws is sufficient evidence of compliance. FirstEnergy Advisors asserts that because these rules exist, it need not demonstrate at this time that neither cross-subsidization between the regulated utility and non-regulated entities will occur[3] nor that the use of "FirstEnergy Advisors" will create customer confusion or anti-competitiveness.[4]

The concerns voiced in the Motions to Suspend,[5] combined with the arguments FirstEnergy Advisors presents in its Memorandum in Opposition, raise issues of fact. Vistra, therefore, requests that the Commission maintain the current suspension of the Application and order a hearing and proceedings. Further, Vistra requests that the Commission grant its Motion to Intervene to contribute to the full development and equitable resolution of these factual issues.

II. ARGUMENT

a. FirstEnergy Advisors does not adequately address concerns that using the name FirstEnergy Advisors will mislead customers in violation of the Commission's consumer protection rules.

In its initial Memorandum in Support ("Vistra Memorandum"), Vistra raised serious concerns that use of the name "FirstEnergy Advisors" would lead customers to believe that FirstEnergy Advisors was soliciting on behalf of FirstEnergy Corp. or other "FirstEnergy" entities in violation of Ohio Admin. Code 4901:1-21-05(C)(10).[6] FirstEnergy Advisors halfheartedly responded that "FirstEnergy Advisors will be acting on behalf of customers by providing

[3] Memorandum in Opposition at 3, 5, 9.
[4] *Id.* at 6–8.
[5] Additionally, on February 21, 2020, Palmer Energy Company, Inc. filed a Motion to Intervene, raising concerns of similar type as those identified in the Motions to Suspend.
[6] Vistra Memorandum at 4–5.

brokerage service,"[7] and "customers have a choice in Ohio and are not forced to accept generation services from their distribution utility."[8] These statements do not address the potential—and apparent intent—to mislead customers by using virtually identical names. As a company that is applying to provide multiple services as an aggregator and power marketer in territories that overlap with other CRES providers and electric distribution utilities ("EDUs"),[9] FirstEnergy Advisors should be well aware that CRES providers are not distinguishable based solely on the services they offer.

The only other assurance that FirstEnergy Advisors offers to prove Ohioans will not be misled, confused, or deceived by use of the "FirstEnergy" name is to cite the Commission's rules requiring utility affiliate disclaimers and requiring that CRES employees disclose the entity the employees represent.[10] The presence of rules is not evidence of compliance; nor is it evidence that such confusion or deception will not occur. Rather, these rules indicate that the Legislature and Commission believe there is the potential to mislead customers in these circumstances and, when presented, the Commission should complete further, yet timely, inquiry and examination to establish safeguards that prevent these occurrences.[11]

Instead of meaningfully addressing the multiple consumer protection concerns raised in the Motions to Suspend,[12] FirstEnergy Advisors argues that it is entitled to use the name FirstEnergy

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[7] Memorandum in Opposition at 7.
[8] *Id.* at 9.
[9] Application at 1–2; Vistra Memorandum at 2.
[10] Memorandum in Opposition at 6.
[11] *See, e.g.*, Ohio Rev. Code § 4928.10(A) where the Ohio Legislature directed the Commission to adopt rules that "include a prohibition against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of such a competitive retail electric service." *See also* Ohio Rev. Code § 4928.08(C) requiring an application for competitive retail electric service be approved within 30 days of filing unless the Commission determines good cause exists to extend the period of further examination by 90 days from the suspension of an application.
[12] FirstEnergy Advisors responded to Vistra's questioning of why the entity could not operate as "Suvon, LLC" to avoid customer confusion by pointing out that Vistra operates multiple CRES providers in Ohio under different names. Memorandum in Opposition at 7; *see* Vistra Memorandum at 5 n.5. However, Vistra does not operate any of its CRES providers using the name "Vistra" or any variation thereof.

Advisors, because (i) the Commission has allowed similar name usage between an EDU and affiliated CRES before without objection,[13] and (ii) because any restriction on the use of a trade name is a "constitutional violation."[14]

FirstEnergy Advisors mischaracterizes previous Commission decisions to support its first argument.[15] Similar name usage was not a disputed issue in the available filings in the dockets FirstEnergy Advisors cited, with the exception of the combined FirstEnergy Service Corp. dockets 00-1862-EL-CSS and 00-1742-EL-CRS pending in 2000.[16] The Commission did not promulgate a version of Ohio Admin. Code 4901:1-21-05(C)(10) until 2008,[17] *after* the OCC raised the issue in the FirstEnergy Service Corp. dockets.[18] Thus, none of the dockets FirstEnergy Advisors cites involved the Commission affirmatively deciding that an affiliated CRES using an EDU name did not violate Ohio Admin. Code 4901:1-21-05(C)(10) and other consumer protection rules.

In terms of the constitutionality of trade name limitations, the issue does not turn on using the name FirstEnergy Advisors in a vacuum. The concerns Vistra raises with the Application relate to customer confusion or instances where a customer could be misled in violation of Ohio Admin. Code 4901:1-37-04(D)(7) or 4901:1-21-05(C)(10) based on FirstEnergy Corp.'s existing marketing. As detailed in the Motions to Suspend, FirstEnergy Corp. has elected to use

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[13] Memorandum in Opposition at 5–7.
[14] *Id.* at 6.
[15] *Id.* at 6–7.
[16] *Id.* at 7.
[17] *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 of the Ohio Administrative Code*, No. 06-653-EL-ORD, FINDING AND ORDER, PART 2 OF 2, at 21 (Nov. 5, 2008). The Commission did not promulgate the current version of Ohio Admin. Code 4901:1-21-05(C)(10) until 2013. *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*, No. 12-1924-EL-ORD, FINDING AND ORDER, at 16 (Dec. 18, 2013). Both versions of Ohio Admin. Code 4901:1-21-05(C)(10) prohibited a CRES from engaging in any solicitation that would lead a customer to believe that the CRES was soliciting on behalf of an Ohio electric utility.
[18] The Commission had just proposed its first round of rules implementing competitive retail electric service standards that spring. *Re Promulgation of Rules for Minimum Competitive Retail Electric Service Standards*, No. 99-1611-EL-ORD, No. 99-1611-EL-ORD, FINDING AND ORDER (Apr. 6, 2000).

"FirstEnergy" as its logo, in the stadium naming in Cleveland, and in its own marketing materials, and now wants to operate its affiliate FirstEnergy Advisors under a substantially similar name, using the same FirstEnergy customer service phone number, FirstEnergy mailing address, and an email address with a "firstenergycorp.com" domain, creating confusion that necessitates further inquiry allowed for under Ohio law.[19]

In the rulemaking docket on which FirstEnergy Advisors relies to assert that a limit on its trade name usage is unconstitutional,[20] the Commission articulated the same analysis that Vistra asserts in its filings: That the issue turns on circumstances beyond the trade name alone. The Commission observed 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."[21] Because the Motions to Suspend question whether such use of "FirstEnergy" by an affiliated CRES provider is misleading or deceptive, the opportunity for confusion, as detailed above, exists, and FirstEnergy Advisors has not explained how it will ensure Ohioans are not mislead, confused, or deceived. Finally, as to the constitutional issue FirstEnergy Advisors raises, the U.S. Supreme Court recognizes the fundamental concept that trade name usage can be limited to restrict false, deceptive, and misleading commercial speech;[22] which is not the offensive commercial speech discussed in the case FirstEnergy Advisors cites.[23]

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[19] Vistra Memorandum at 4.
[20] Memorandum in Opposition at 6.
[21] *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*, No. 12-1924-EL-ORD, FINDING AND ORDER, at 14 (Dec. 18, 2013) (emphasis added).
[22] *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (holding that a prohibition on the practice of optometry under a trade name is constitutionally permissible where used to protect the public from "false, deceptive, and misleading commercial speech."); *see also Matal v. Tam*, 582 U.S. 1, 6 (2017) ("It is well settled, for instance, that to the extent a trademark is confusing or misleading the law can protect consumers . . . .").
[23] Memorandum in Opposition at 6 (citing *Sambo's Restaurant, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981) (holding that an obviously offensive trade name cannot be prohibited under the First Amendment)).

Given the issues of fact raised between the Application, the Motions to Suspend, and the Memorandum in Opposition, if FirstEnergy Advisors is confident that it has sufficient documentation or support to ensure customers will not be misled or confused by the fact that the FirstEnergy Advisors name overlaps with other FirstEnergy entities, it should have no reluctance to agree to further examination of this evidence under the Commission's procedures.

b. FirstEnergy Advisors has not demonstrated how it will ensure no cross-subsidization occurs.

FirstEnergy Advisors argues that because it will operate under Suvon, LLC, and because there are service employee cost allocation rules under Ohio Admin. Code 4901:1-37-04(A)(5) and 4901:1-37-08, all regulated and unregulated business concerns are addressed.[24] It has not, however, demonstrated how it will ensure that no cross-subsidization between the regulated and unregulated business operations occurs, especially given the officers and employees it shares with FirstEnergy Corp.[25] Instead, FirstEnergy Advisors appears to take the position that the Commission must wait until there is a violation and cross-subsidization or other commingling occurs before it can even consider whether or not the structure FirstEnergy Advisors proposes is sufficient to ensure no violation of Ohio Rev. Code § 4928.17(A)(1) (governing corporate separation) and Ohio Rev. Code § 4928.17 (prohibiting cross-subsidization).[26]

FirstEnergy Advisors misunderstands the CRES application and approval process. Ohio Admin. Code 4901:1-24-10(C), which outlines the CRES application approval criteria, states that the applicant must be "managerially, financially, and technically fit and capable of complying with all applicable commission rules and orders." Thus, the CRES application and approval process is forward-looking, and allows the Commission to evaluate whether an applicant has demonstrated

[24] *Id*. at 1–5.
[25] *Id*. at 1–3 (acknowledging this relationship).
[26] *Id*. at 4–5.

that they can comply with Commission rules, not whether they have already violated them. The Legislature intended applications to be approved within 30 days of filing, unless the Commission suspends the application for good cause shown.[27] There would be little reason to have such a process if the Commission's review of an application was perfunctory and analysis of the issues raised by the Motions to Suspend was entirely retroactive.

Here, FirstEnergy Advisors cites "exhaustive protections" against cross-subsidization in Ohio Admin. Code 4901:1-37-04 to argue that these rules are evidence that it will not engage in anti-competitive behavior.[28] As with the consumer protection rules and regulations FirstEnergy Advisors cites, these competition-preserving rules are evidence that the Legislature and Commission view this type of behavior as raising serious concerns that merit further investigation prior to certifying the Application.

Finally, FirstEnergy Advisors never identifies whether it has limited the potential for anti-competitive behavior through agreements, policies, or procedures between the entities organized under FirstEnergy Corp., including FirstEnergy Advisors. Thus, the Commission should investigate those measures that have been implemented and confirm whether they offer sufficient protections. If FirstEnergy Corp. is confident that its existing measures assure compliance, then there should be no objection to allowing the Commission to review those agreements, ask additional questions, and ensure that the Application and corporate organization as proposed will be consistent with Ohio law and in the best interest of Ohio customers.

[27] Ohio Rev. Code § 4928.08(B).
[28] Memorandum in Opposition at 9.

III. CONCLUSION

Vistra respectfully requests that the Commission maintain the current suspension of the Application for further review. Vistra also restates its request to intervene in accordance with its uncontested Motion to Intervene filed on February 11, 2020.

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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 25th day of February 2020. The Commission's e-filing system will serve notice of the filing of this document on the parties who have electronically subscribed to this case. In addition, I hereby certify that a copy of the foregoing was sent via overnight U.S. mail to the following person on February 25, 2020.

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Summary: Reply Reply of Vistra Energy Corp. to Suvon, LLC's Memorandum in Opposition to the Motions to Suspend Filed by the Ohio Consumers' Counsel, NOPEC, NOAC, and Vistra Energy Corp. electronically filed by Ina Avalon on behalf of Vistra Energy Corp.