BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Suvon, LLC, d/b/a FirstEnergy Advisors for Certification as an Aggregator and Power Broker.	))))	20-0103-EL-AGG

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE
AND
MEMORANDUM CONTRA MOTION TO STRIKE OF
RETAIL ENERGY SUPPLY ASSOCIATION

Suvon, LLC DBA FirstEnergy Advisors (Suvon) not only objects to RESA's intervention, but also seeks an order striking the portion of RESA's motion that explains the "nature and extent of the prospective intervenor's interest" and "[t]he legal position advanced by the prospective intervenor and its probable relation to the merits of the case."[1] Suvon's motion to strike should be denied and RESA's motion to intervene granted.

INTRODUCTION

When the Commission suspends a certificate application (as it did here), it may "set the matter for hearing."[2] The purpose of a hearing is to afford interested parties the opportunity to build a record for or against issuance of a certificate. The Commission may consider "*any* additional information as the commission deems necessary to evaluate the application."[3] Suvon does not get to decide who is allowed to participate in the proceeding, what issues may be raised, or what information and evidence the Commission may consider.

[1] O.A.C. 4901-1-11(B)(1) and (2).
[2] O.A.C. 4901:1-24-10(A)(2)(c).
[3] O.A.C. 4901:1-24-10(A)(2)(a) (emphasis added).

Not much needs to be said about the motion to strike. "Irrelevant" is the weakest possible argument.[4] "Most pleadings probably contain information that one party deems relevant but that the other party does not. We do not wish to encourage the practice of filing Civ.R. 12(F) motions over every bit of irrelevant information."[5] A motion to strike "is a drastic remedy to be resorted to only when required for the purposes of justice."[6] Suvon has responded to RESA's motion, so it cannot claim prejudice by the introduction of supposedly "irrelevant" arguments.

Suvon's lead argument against intervention is also based on relevance. Suvon cites cases where intervention was denied to parties attempting to raise issues "outside . . . the scope of this proceeding," "matters other than the amendment application," or where the movant "failed to address the subject matter of the case."[7] None of that has happened here. RESA's motion to intervene stakes-out RESA's legal position and explains how this position relates to the factors the Commission must consider in evaluating Suvon's application. RESA has a right to raise these issues.

"In evaluating an application, the commission will consider the information contained in the applicant's application, supporting attachments and *evidence*, and *recommendations of its staff*."[8] Staff cannot make an informed recommendation without hearing all sides of the issues. The motion to strike must be denied and RESA's name added to the list of stakeholders who should be granted intervention.

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[4] Suvon at 2.
[5] *State ex rel. Repeal Lorain Cty. Permissive Sales Tax Comm. v. Lorain Cty. Bd. of Elections,* 2017-Ohio-7648, ¶ 7, 151 Ohio St. 3d 247, 249, 87 N.E.3d 1234, 1236.
[6] *Microsoft Corp. v. Lutian,* No. 1:10 CV 1373, 2011 WL 4496531, at *2 (N.D. Ohio Sept. 27, 2011).
[7] Suvon at 3.
[8] O.A.C. 4901:1-24-10(B) (emphasis added).

ARGUMENT

In considering a motion to intervene, the Commission must evaluate "[t]he legal position advanced by the prospective intervenor and its probable relation to the merits of the case."[9] Here, the "merits of the case" include consideration of whether "[t]he applicant is managerially, financially, and technically fit and capable of complying with *all* applicable commission rules and orders."[10] RESA's legal position focuses on Commission rules and orders about corporate separation. The fact that RESA has raised these issues before does not preclude RESA from raising them again. RESA *must* raise the issues again because the Commission has not yet dealt with them.

A. RESA's legal position is relevant to the merits of the Application.

RESA has called attention to corporate separation issues raised in matters pending *before* Suvon filed its application to explain why the application deserves a closer look. RESA's concerns are anything but "hypothetical," and an independent auditor has expressed the same concerns.[11]

In the FirstEnergy EDUs' corporate separation audit, Case No. 17-974-EL-UNC, the Sage Report notes that "it is impossible" to not make a connection between the FirstEnergy EDUs and FirstEnergy Solutions Corp. (FES) due to the common use of the "FirstEnergy" name.[12] The Sage Report recommends that "to eliminate affiliate bias," the FirstEnergy EDUs' affiliated CRES provider be prohibited from using a common name.[13] The auditors were also

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[9] O.A.C. 4901-1-11(B)(2).
[10] O.A.C. 4901:1-24-10(C) (emphasis added).
[11] Suvon at 7-8.
[12] *Sage Management Consultants, LLC Compliance Audit, Final Report, May 14, 2018,* Case No. 17-974-EL-UNC (filed May 14, 2018), at 98.
[13] *Id*.

highly critical of FirstEnergy "shared services" employees managing or interacting with both regulated and unregulated affiliates and lack of familiarity with corporate separation requirements.[14]

RESA's complaint in Case No. 18-736-EL-CSS[15] challenges "Smart Mart," an online sales channel through which the FirstEnergy EDUs offer "nonelectric products and services" such as internet, security systems, and home automation to captive ratepayers. As described in the Sage Report, Smart Mart operates under "FirstEnergy Products" (FEP). "FEP is not a legal entity. It is a business unit operated by the FirstEnergy Service Company (Service Company) on behalf of the Ohio Companies and other FirstEnergy utility operating companies."[7] The same Service Company employees who operated Smart Mart "on behalf of" the EDUs also worked with FES to "bundle" retail offerings.[8] Suvon is now involved in these service offerings as well, and has been since September 2019.[16]

Neither the auditor's findings nor RESA's allegations bind the Commission in this proceeding—just as the Commission is not bound by the limited information Suvon disclosed in its application. But it is absurd to suggest that the Commission should just ignore the auditors' findings or RESA's allegations. Suvon has planted red flags throughout its application; it is appropriate for the Commission to examine them *before* granting a certificate. If anything, the fact that RESA's legal position *in this case* is consistent with its position in the audit and complaint proceedings demonstrates RESA's ability to "significantly contribute to full development and equitable resolution of the factual issues."[17]

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[14] *Id*. at 34-36.

[15] Case No. 18-736-EL-CSS (Complaint filed April 25, 2018).

[16] Application, Exhibit A-13.

[17] O.A.C. 4901-1-11(B)(4).

If the Commission grants the certificate, everyone knows what FirstEnergy will say in the audit proceeding and RESA complaint case: that those cases should be closed, because the Commission would not have granted a certificate in *this* proceeding if it believed the issues raised in the *previous* proceedings had merit.[18] If RESA had *not* intervened here, its failure to do so would undoubtably be hammered-on when the other proceedings resume.

RESA is not concerned about "precedent" that could be used against it "in a subsequent case."[19] The audit and complaint proceeding raised corporate separation issues well before Suvon filed its application. The concern about any "precedent" established in this case is how it may impact RESA's position in matters that pre-date the application—not potential or speculative matters that could hypothetically arise "in a subsequent case." The circumstances here are completely different from cases where intervention was denied because the movant wanted to establish or prevent new "precedent."

Suvon is completely wrong to claim that the audit proceeding and complaint case "have already been fully briefed and are awaiting decision."[20] The complaint case was stayed before discovery could be started.[21] The Commission has not issued an order explaining next steps in the audit.[22] The issues raised in those proceedings are a long way from resolution. Suvon's application forces the Commission to consider these issues in yet a third proceeding.

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[18] *See* Suvon at 7 ("If it were truly misleading to use the same named as a regulated utility, the Commission would not have repeatedly approved these names over the last twenty years.").
[19] Suvon at 4.
[20] Suvon at 5.
[21] *In the Matter 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.
[22] *Id.*

RESA has called attention to issues that might not be "relevant" to Suvon, but it is not Suvon's opinion that matters. The Commission is entitled to know whether the corporate separation violations identified in two previous cases continue to exist.

B. Suvon's response to RESA's legal position is irrelevant to whether the intervention standard has been met.

Suvon disagrees with RESA's legal position. No surprise there. This only shows there is a disagreement over whether the legal requirements for obtaining a certificate have been met. These arguments can be fleshed-out at hearing and in briefing. Intervention should be granted for this very reason: so that a party on the other side of the matters at issue may participate in the proceeding, put on and rebut evidence, and help the Commission make a fully-informed decision.

Suvon addresses the corporate name issue by setting up a straw man and knocking it down. RESA has *not* argued that there is or should be a general prohibition on an affiliate's use of a common corporate name. RESA's objection is limited to the appropriate scope of this proceeding—whether this particular affiliate, Suvon—should should be permitted to use the FirstEnergy name in offering brokering and aggregation services. RESA is not aware of complaints or concerns about corporate separation issues within AEP, Duke, or other organizations. Perhaps there are reasons RESA *should be* concerned, or perhaps there are not. The point is that what other organizations do is irrelevant. "Everyone else is doing it" is not a defense for what FirstEnergy is proposing to do.

The threshold problem with Suvon's proposed use of the FirstEnergy name is not because of any statute expressly forbidding or allowing the joint use of common names. The threshold problem is the FirstEnergy EDU's corporate separation plan: "In order to ensure compliance

with corporate separation rules and regulations the Companies do not plan to joint advertise or joint market with any unregulated competitive affiliate, and if that position changes, they will advise the Commission."[42]

Confronted with its own words, Suvon claims they mean something other than what they say—"branding" is not "advertising," and again, "everyone else is doing it."[23] Even if joint advertising mean "things like joint television commercials," the concept of joint "marketing" encompasses a larger swath of activity. Suvon has no explanation for what it means to "joint advertise or joint market," other than that *isn't* what it plans to do.

Under the former rules applicable to electric transition plans, the Commission recognized that the use of common names by an affiliate and EDU is a form of "joint advertising."[24] While the Commission "will not presume that all joint marketing or similar names/logos are automatically unreasonable or require a disclaimer," "[i]n the event of specific questionable behavior, the Commission can address it."[25] The Commission has never, in any context, given blanket approval for joint advertising through the use of a common corporate name.

To say that "[t]he 'FirstEnergy' brand is owned by FirstEnergy Corp. and may be used as FirstEnergy Corp. sees fit" is the height of hubris. *All* entities affiliated with FirstEnergy are subject to the EDUs' corporate separation plan. The plan must ensure that "the *utility will not extend* any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service;" that "*any such affiliate*, division, or part *will not receive* undue preference or

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[23] Suvon at 10-11.
[24] *In Re Chapter 4901:1-20, Ohio Admin. Code,* Case No. 04-48-EL-ORD (Finding and Order, July 28, 2004).
[25] *Id.*

advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service;" and that *"[n]o such utility, affiliate, division, or part shall extend such undue preference*."[27] The Commission may restrict *Suvon's* use of a corporate name regardless of FirstEnergy Corp.'s intellectual property rights.

Likewise, to say that "Ohio law expressly permits the use of shared service employees" also misses the point.[26] The point is how these shared service employees *function*. Shared services employees who provide competitive services must "function independently" from employees who provide noncompetitive services.[27] Shared service employees cannot act as a conduit for transmitting information between competitive and non-competitive businesses, but that is exactly what FirstEnergy does.

The auditors were highly critical of FirstEnergy "shared services" employees managing or interacting with both regulated and unregulated affiliates.[28] As noted in the Sage Report, "some Service Company employees designated as 'Shared Services' were not completely familiar with their FERC designation and did not understand well the restrictions that come with the designation."[29] Within FirstEnergy, the shared services designation is "overused,"[30] resulting in the same people providing services to both regulated and unregulated entities. "Attendance by the FES CRES retail sales executive at meetings with other Service Company executives focused on regulated utility operations is problematic. It makes separation of regulated and competitive

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[26] Suvon at 11.
[27] O.A.C. 4901:1-37-04(A)(1)("Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other.")
[28] *Sage Management Consultants, LLC Compliance Audit, Final Report, May 14, 2018,* Case No. 17-974-EL-UNC (filed May 14, 2018), at 34.
[29] *Id.* at 36.
[30] *Id.* at 35.

information highly challenging."[31] The auditors characterize this structure as "highly inappropriate."[32]

Suvon is a new entity but is managed by the same people and organizations faulted by the auditors for corporate separation lapses. Isn't the Commission entitled to know what, if anything, will be different with Suvon? The Commission should not just accept a vague, generalized promise to follow Ohio law. A hearing or other proceeding should be held to explore these issues.

CONCLUSION

The corporate separation audit and RESA's complaint raise serious concerns about the FirstEnergy organization's compliance with corporate separation. The Commission should address these concerns before ruling on Suvon's application. RESA should be permitted to intervene in order to facilitate development of the necessary factual record to resolve these issues.

Dated: April 8, 2020

Respectfully submitted,

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[31] *Id.* at 34.
[32] *Id*.

CERTIFICATE OF SERVICE

RESA certifies that a copy of the foregoing was served by electronic mail this 8th day of April, 2020 to the following:

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Summary: Text Reply Memorandum in Support of Motion to Intervene and Memorandum Contra Suvon, LLC's Motion to Strike electronically filed by Mr. Lucas A Fykes on behalf of Retail Energy Supply Association