

the Application is consistent with Ohio law and Public Utilities Commission of Ohio (“Commission”) precedent.³

Vistra respectfully requests that the Commission either: (1) set the matter for hearing, consistent with Ohio Admin. Code 4901:1-24-10(A)(2)(c), and establish a procedural schedule to allow orderly discovery of the issues intervenors have raised regarding the Application, or (2) deny the Application, consistent with Ohio Admin. Code 4901:1-24-10(F).

I. Supplemental Filing

The Supplemental Filing made by FirstEnergy Advisors provides general narrative explanations and additional descriptions of FirstEnergy Advisors’ experience and plans. According to the Commission’s CRES application form, these exhibits should include information as follows:

- Exhibit B-2: applicant’s experience and plan for contracting customers, providing contracted services, providing billing statements, and responding to customer inquiries and complaints.
- Exhibit B-3: applicant’s experience in aggregation services including contracting with and representing customers in electric load and electric services, respectively.

FirstEnergy Advisors uses these exhibits to provide details on some of the issues it claimed in its February Memorandum in Opposition were not “relevant to, nor appropriate for, this case.”⁴ As discussed in greater detail below, the Application and the Supplemental Filing fail to contain “sufficient information to enable the commission to assess an applicant's managerial, financial,

³ Vistra acknowledges there is no formal process under which to submit comments on a supplemental filing by an applicant under Ohio Admin. Code 4901:1-24-10 absent an order from the Commission setting a date for hearing and associated procedural schedule. Given that the 90-day timeline contemplated under Ohio Admin. Code 4901:1-24-10(A)(2)(b) is set to run on May 22, 2020, Vistra seeks to provide information in the case record regarding this Supplemental Filing for the Commission’s consideration.

⁴ February Memorandum in Opposition at 10.

and technical capability to provide the service it intends to offer and its ability to comply with commission rules or orders adopted pursuant to Chapter 4928. of the Revised Code.”⁵

a. Exhibit B-2

As stated above, Exhibit B-2 should provide the applicant’s overall experience interacting with customers and its plan for responding to customer inquiries and complaints. FirstEnergy Advisors used the Supplemental Filing to expand its original two-paragraph Exhibit B-2 it provided with its Application into three pages of text lightly touching on, but in no way resolving, several concerns raised by intervenors in this case.

Previously, FirstEnergy Advisors bristled at the questions Vistra and other intervenors raised regarding its accounting and corporate separation procedures.⁶ FirstEnergy Advisors claimed that these concerns were not an issue because “FirstEnergy Advisors complies with all corporate separation rules.”⁷ Despite this objection, FirstEnergy Advisors’ Supplemental Filing now insists that because FirstEnergy Corp. maintains a CAM that is audited *internally* on an annual basis and a Corporate Separation Plan, it will comply with the Commission’s corporate separation rules.⁸

This assertion is incorrect on multiple counts. First, much of the information contained in Exhibit B-2 of the Supplemental Filing is inconsistent with the types of information the Commission’s application requires for Exhibit B-2. Second, neither the current CAM nor the Corporate Separation Plan that will supposedly be applied to FirstEnergy Advisors’ activities are part of the record in this case. Third, the Application states that FirstEnergy Advisors “has no experience providing aggregation services,” which questions whether the CAM and Corporate

⁵ Ohio Admin. Code 4901:1-24-05(A) (emphasis added).

⁶ *Id.* at 1-5.

⁷ *Id.* at 5.

⁸ Supplemental Filing at Exhibit B-2 at 2-3.

Separation Plan adequately address the activities that FirstEnergy Corp. now seeks to undertake through FirstEnergy Advisors. Finally, there is no information on the results of the “internal annual review” of the CAM in recent years and whether FirstEnergy Corp. itself has identified if there are any areas that require additional attention to ensure appropriate allocation and separation related to its other non-regulated activities.

The general and conclusive nature of this information supplemented to an exhibit that is required to address plans for contracting with customers and responding to any inquiries or complaints by customers does not adequately address the concerns raised by intervenors in this case. These issues should be subject to further inquiry and evaluation through discovery and an evidentiary hearing to ensure that Ohio customers who chose to interact with the non-regulated CRES will not be cross-subsidizing any activities of the regulated utility or vice versa.

In its February Memorandum in Opposition, FirstEnergy Advisors dismissed Vistra’s concerns that use of the “FirstEnergy” name would create customer confusion by stating that there would be “no chance of customer confusion or that customers would believe they were being solicited by another entity.”⁹ Despite this bold position in February, FirstEnergy Advisors insists shared employees will “clearly disclos[e] who they are representing” and it has now provided the language (or similar) that it intends to use on marketing and advertising materials in an insufficient attempt to address Vistra’s concerns.¹⁰ This proposed disclaimer language fails, however, to address the customer confusion concerns raised by Vistra and other intervenors and only highlights the opportunities for customer confusion if the Application is approved.

There are significant problems with the proposed disclaimer. As an initial matter, the length of the disclaimer FirstEnergy Advisors now proposes immediately raises the question of what size

⁹ February Memorandum in Opposition at 7.

¹⁰ Supplemental Filing at Exhibit B-2 at 3-4.

font such a lengthy disclaimer will be provided in, and whether it will be conspicuous enough for customers to recognize. Second, noticeably absent from the Supplemental Filing is an affirmative statement that no advertising materials or any shared representative/employee will use either the FirstEnergy logo¹¹ or solely “FirstEnergy” when soliciting for business on behalf of, or representing, FirstEnergy Advisors. Finally, the FirstEnergy Advisors’ disclaimer includes FirstEnergy Corp.’s non-Ohio entities, which would be completely unfamiliar to Ohio customers, resulting in an elongated disclaimer that buries the applicable information in unnecessary text. The proposed disclaimer is inadequate to address the customer confusion concerns raised in this case by intervenors and, in fact, raises new questions associated with the Application and FirstEnergy Advisors’ overall request.

While the Supplemental Filing states that an employee’s failure to “clearly disclose whom they are representing . . . may result in adverse employment action,” the Supplemental Filing does not discuss the measures FirstEnergy Advisors will employ to audit such behavior and evaluate whether any such instances have occurred, how they have been addressed, and the likelihood of occurrence under the present Application.¹² The information the Supplemental Filing provides in response to Vistra’s concerns about potential customer confusion in the use of the “FirstEnergy” name raises more questions than it attempts to address, further emphasizing the need for additional discovery and evidentiary proceedings on the Application.¹³

¹¹ FirstEnergy Advisors has not provided an exemplar of the logo it intends to use for the company at this time to allow the Commission to evaluate whether it is significantly differently from the “FirstEnergy” general logo, which is widely seen in Ohio, including for FirstEnergy Home services (a separately non-regulated subsidiary of FirstEnergy Corp. and Suvon, LLC) and on FirstEnergy Stadium.

¹² *Id.* at 3-4. (emphasis added).

¹³ While the Supplemental Filing, consistent with the Application, provides that customers will have a toll-free number for inquiries and complaints, it is not clear if it will be a FirstEnergy Advisors-specific number or a number that will be affiliated with FirstEnergy Corp., similar to the email address provided in the Application. *See* Application at Section A-7; Vistra’s Memorandum in Support of its Motion to Deny or Suspend Application at 5.

Vistra’s concerns about potential confusion are further highlighted in Exhibit B-2 where four iterations of “FirstEnergy” appear in two lines of a paragraph.¹⁴ In this section, FirstEnergy Advisors provides the following: “subsidiary of FirstEnergy Corp. Indirect costs for products or services provided by FirstEnergy Service Company to [FirstEnergy Advisors] will be allocated in accordance with FirstEnergy’s CAM”¹⁵ While those familiar with the detailed corporate structure, affiliations, and commonality in certain names might understand this statement, this portion of the Supplemental Filing illustrates the customer confusion that could result from use of the “FirstEnergy” name. This portion of the Supplemental Filing also reverts to using the shorthand “FirstEnergy” in a pair of sentences that name three different FirstEnergy entities, demonstrating how simple it is to revert to using only “FirstEnergy” in discussing these entities.¹⁶ The Supplemental Filing emphasizes the appropriateness of further inquiry into the Application beyond what has been completed to date and ordering a procedural schedule that will allow for discovery by the intervenors and a hearing on the issues raised to date.

b. Exhibit B-3

FirstEnergy Advisors’ Supplemental Filing adds one sentence about separation of certain FirstEnergy Advisors employees from regulated utility information to Exhibit B-3 beyond the information included in the Application. Several intervenors have questioned the separation of FirstEnergy entities given significant overlap in the principle officers, directors, and partners of FirstEnergy Advisors and FirstEnergy Corp.¹⁷ This one new sentence states that customer-facing employees would be restricted from access to regulated information.¹⁸ Questions remain with

¹⁴ Supplemental Filing at Exhibit B-2 at 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Application at A-12; Joint Motion of Northeast Ohio Public Energy Council and the Office of the Ohio Consumers’ Counsel at 10-12.

¹⁸ Supplemental Filing at Exhibit B-3 at 1.

respect to the safeguards that will be in place to ensure that there is no sharing of competitive information between those officers and directors with shared responsibilities between the regulated and non-regulated entities. Additionally, the significant overlap between the leadership of FirstEnergy Corp. and FirstEnergy Advisors continues to present the unresolved issue that decisions will be made in either the regulated or non-regulated entity operations by individuals who have intimate knowledge of the operations of both entities.

Indeed, the Supplemental Filing has left unaddressed multiple corporate separation and anti-competition concerns Vistra raised over the course of this case. First, the potential for confusion discussed above and in FirstEnergy Advisors' development of disclaimer language demonstrate the inherent name recognition associated with use of "FirstEnergy" in the Company's venture of becoming an aggregator and power broker. There is, therefore, at least a perception of co-mingling between the regulated and non-regulated businesses given the value of the goodwill that FirstEnergy Advisors sees in using the "FirstEnergy" name. Second, FirstEnergy Advisors has never responded to Vistra's concerns that the CRES would have access to a ready-made market shared by the FirstEnergy entities. Third, FirstEnergy has ignored most of the corporate separation and anti-competition concerns raised by other intervenors, including, but not limited to, auditor concerns regarding management co-mingling, lack of applicable shared employee exceptions, prior Commission investigation into the Corporate Separation Plan, and the limitations imposed by numerous corporate separation and consumer protection statutes and regulations. The overlap between the regulated and non-regulated entities and FirstEnergy's failure to respond to these concerns further supports the Commission ordering this matter for hearing.

II. Conclusion

Vistra appreciates the continued opportunity to participate in this case. The information provided by FirstEnergy Advisors in its Application and Supplemental Filing does not provide the

information required under Ohio law to allow the Commission to assess the “managerial, financial, and technical capability” of FirstEnergy Advisors to ensure that, by granting its certificate, the FirstEnergy Advisors can comply with Commission rules and orders.¹⁹ Vistra respectfully requests that the Commission set a procedural schedule to allow discovery on the issues raised in the motions to deny or suspend filed by the intervenors²⁰ in this case and order an evidentiary hearing on the Application.

Respectfully submitted,



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¹⁹ Ohio Admin. Code 4901:1-24-05(A) (emphasis added).

²⁰ Vistra refers to both the motions filed by those that have filed unopposed motions to intervene, like Vistra, and those whose motions to intervene have been opposed. Vistra takes no position, at this time, on whether the opposed motions to intervene should be granted, but recognizes the value of input from multiple parties to ensure full development of the record and verification of compliance with Ohio law and Commission orders and rules.

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 14th of April 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 April 14, 2020.



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Case No(s). 20-0103-EL-AGG

Summary: Response Vistra Energy Corp.'s Response to Supplemental Exhibits B-2 and B-3 of the Application Filed by Suvon, LLC d/b/a FirstEnergy Advisors electronically filed by Ina Avalon on behalf of Vistra Energy Corp.