

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. 20-103-EL-AGG

FINDING AND ORDER

Entered in the Journal on April 22, 2020

I. SUMMARY

{¶ 1} In this Finding and Order, the Commission approves the application for certification as a competitive retail electric service power broker and aggregator filed by Suvon, LLC d/b/a FirstEnergy Advisors.

II. HISTORY OF THE PROCEEDING

{¶ 2} On January 17, 2020, Suvon, LLC d/b/a FirstEnergy Advisors (Suvon) filed an application for certification as a competitive retail electric service power broker and aggregator in the state of Ohio. In addition, Suvon also requested protective treatment for certain exhibits filed with its application, which were filed under seal pursuant to Ohio Adm.Code 4901:1-24-08(a). Suvon filed a supplement to its application on April 1, 2020.

{¶ 3} Motions to intervene were filed by the Ohio Consumers' Counsel (OCC) and Northeast Ohio Public Energy Council (NOPEC) on February 10, 2020. Vistra Energy Corp. and its subsidiaries (Vistra) filed a motion to intervene on February 11, 2020. On February 18, 2020, the Northwest Aggregation Coalition (NOAC) also filed a motion to intervene. No memoranda contra these motions to intervene were filed.

{¶ 4} Further, on February 21, 2020, Palmer Energy Company, Inc., (Palmer) filed a motion to intervene. Suvon filed a memorandum contra Palmer's motion on March 9, 2020. Palmer filed its reply on March 17, 2020.

{¶ 5} Energy Professionals of Ohio LLC (EPO) also filed a motion to intervene on February 21, 2020. Suvon filed a memorandum contra EPO's motion on March 9, 2020. EPO filed its reply on March 16, 2020.

{¶ 6} On March 17, 2020, the Retail Energy Supply Association (RESA) filed a motion to intervene. Suvon filed a memorandum contra the motion on April 1, 2020. Suvon also filed a motion to strike portions of RESA's motion on April 1, 2020. RESA filed a reply to the memorandum contra the motion to intervene and a memorandum contra the motion to strike on April 8, 2020. Suvon filed a reply to the memorandum contra the motion to strike on April 15, 2020.

{¶ 7} Interstate Gas Supply, Inc. (IGS) filed a motion to intervene on March 25, 2020. IGS further requests that the Commission establish a procedural schedule for this proceeding. Suvon filed a memorandum contra the motion on April 9, 2020. IGS filed its reply on April 16, 2020.

{¶ 8} In addition, OCC¹ and NOPEC filed a joint motion to suspend the certification application on February 10, 2020. Vistra also filed a motion to deny or suspend the application on February 11, 2020. On February 18, 2020, NOAC filed a motion requesting a hearing in this proceeding.

{¶ 9} On April 7, 2020, Staff filed its review and recommendation, recommending that the application be granted.

{¶ 10} On April 14, 2020, NOPEC filed a response to the Suvon's supplement to its application and to the Staff review and recommendation. Vistra filed a response to Suvon's

¹ On April 17, 2020, OCC filed a motion for leave to file comments instanter and additional comments. The Commission finds that the motion for leave to file comments instanter should be denied. The application for certification in this proceeding was suspended on April 11, 2020; R.C. 4928.08(B) directs the Commission to act to approve or deny certification within 90 days after the date of the suspension. Accepting OCC's untimely additional comments will unduly delay the resolution of this case. We also note that OCC's untimely additional comments do little more than repeat arguments previously raised by OCC and NOPEC in their February 10, 2020 filing. These arguments have been fully considered and addressed by the Commission.

supplement to its application on April 14, 2020. EPO filed correspondence in support of Vistra's response on April 16, 2020.

III. DISCUSSION

A. *Intervention*

{¶ 11} Motions to intervene in this proceeding have been filed by OCC, NOPEC, Vistra and NOAC. No party opposed the motions. The Commission finds that the motions to intervene are reasonable and should be granted.

{¶ 12} Palmer, EPO, RESA and IGS also filed motions to intervene in this proceeding. Suvon opposed each of these motions to intervene. The Commission notes that the Supreme Court of Ohio has ruled that intervention in Commission proceedings should be liberally allowed. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.3d 384 at ¶ 20. Accordingly, we find that Palmer, EPO, RESA and IGS have each met the criteria set forth in R.C. 4903.221(B) and Ohio Adm.Code 4901:1-11(B) and that the motions to intervene should be granted.

{¶ 13} However, the Commission notes that several of the motions to intervene were filed by Suvon's competitors. Competition should be determined ultimately by acumen in the marketplace, not by presumptive inhibition through a Commission certification proceeding. Although we have granted intervention in this case to Suvon's competitors, we will carefully monitor the practice of competitors intervening in certification proceedings to ensure that this does not become a widespread, abusive practice and that competition is not unduly stifled by unnecessary litigation.

B. *Managerial, Technical and Financial Capability*

{¶ 14} In their joint motion to suspend the certification application, OCC and NOPEC claim Suvon is an affiliate of the FirstEnergy electric distribution companies, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy Utilities). As Suvon will be managed and controlled by members of the same

management team that controls the FirstEnergy Utilities, OCC and NOPEC argue that constitutes a violation of R.C. 4928.17(A), which requires that a competitive retail electric supplier be “fully separated” from its regulated utilities. Further, OCC and NOPEC contend that the application runs contrary to the recommendations set forth in the audit report filed in the Commission’s review of the Companies’ compliance with the corporate separation rules. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC (*Corporate Separation Audit Case*), SAGE Management Consultants, LLC Final Audit Report (May 14, 2018) at 46, 98-99. Likewise, RESA states that it has two major concerns with the application: the use of the trade name, “FirstEnergy Advisors” and the sharing of officers and directors of both Suvon and the FirstEnergy Utilities, citing also to the findings in the audit report in the *Corporate Separation Audit Case* in support of its arguments. *Id.* at 34-36, 98. IGS asserts that the application lacks sufficient information to determine if Suvon has the ability to comply with the corporate separation rules.

{¶ 15} In its motion to suspend or reject the application, Vistra argues that the trade name “FirstEnergy Advisors” is misleading, in violation of the Commission’s consumer protection rules. Vistra also argues that approving Suvon’s application will inhibit the competition the General Assembly tasked the Commission with protecting, speculating that the relationship between FirstEnergy Corp. and Suvon positions Suvon to exercise disproportionate market power.

{¶ 16} In its memoranda contra the motions to suspend, Suvon responds that there is no prohibition on the use of shared service employees. Suvon notes that it is a separate corporate entity and that the use of shared service employees has nothing to with its corporate structure. Suvon claims that there is no violation of R.C. 4928.17(A)(1) because it is a separate corporate entity from the utilities owned by FirstEnergy Corp., it will operate independently from the utilities, and it will comply with the corporate separation rules. Suvon contends that OCC and NOPEC present no evidence of any violation of these rules.

{¶ 17} Suvon also argues that the use of the name “FirstEnergy Advisors” is not a violation of Commission rules and that any such restriction would violate the Constitution. Suvon notes that the Commission has held 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. *In re the Commission’s Review of its Rules for Competitive Retail Electric Service*, Case No. 12-1924-EL-ORD, Finding and Order (Dec. 18, 2013) at 18 (citing *Ohio Consumers’ Counsel v. Interstate Gas Supply d/b/a Columbia Retail Energy*, Case No. 10-2395-GA-CSS, Opinion and Order (Aug. 15, 2012)). Suvon also contends that tradenames have long been recognized as constitutionally protected commercial speech. Suvon disputes Vistra’s claim that approval of the application would be anticompetitive; Suvon argues that the claim is baseless because additional competitors inherently increase competition. Suvon concludes that the only relevant issue before the Commission in this case is Suvon’s qualifications under the Commission’s application process.

{¶ 18} In its response to Suvon’s supplemental filing, Vistra speculates that Suvon made the filing to address claimed inadequacies in the application identified by intervenors. However, Vistra contends that the supplemental filing does not sufficiently address the use of the trade name, “FirstEnergy Advisors,” or compliance with corporate separation requirements. NOPEC, in its response to the supplemental filing and the Staff review and recommendation, argues that both the supplement and the Staff review and recommendation failed to address the central question of whether the corporate separation rules are violated if a CRES provider is managed and controlled by the same individuals that control affiliated electric distribution utilities. NOPEC recommends that the Commission reject the Staff review and recommendation because it failed to address this central question.

{¶ 19} The Commission notes that the arguments of intervenors center around questions regarding the fact that Suvon will be doing business under a trade name derived from the name of its corporate parent, FirstEnergy Corp., and whether Suvon is properly

separated from the FirstEnergy Utilities. We note that these are not new or novel questions. FirstEnergy Corp. has previously had a competitive affiliate certified as a CRES provider in this state. *In re FirstEnergy Solutions Corp.*, Case No. 00-1742-EL-CRS, Entry (Nov. 2, 2000). Likewise, we have certified other CRES providers who are or were affiliated with a public utility in this state. *In re AEP Energy, Inc.*, Case No. 10-384-EL-CRS; *In re IGS Dayton, Inc., f/k/a DP&L Energy Resources, Inc.*, Case No. 00-2171-EL-CRS. Further, certified competitive retail natural gas suppliers, who were unaffiliated with any public utility, have reached contractual agreements to use a trade name similar to the name of a public utility. *Ohio Consumers' Counsel v. Interstate Gas Supply d/b/a Columbia Retail Energy*, Case No. 10-2395-GA-CSS, Opinion and Order (Aug. 15, 2012). We note that the existing requirements for proper disclosure of the affiliate relationship has been considered to be a necessary and sufficient protection in all prior cases. We expect Suvon to include and present the required disclosure, in a conspicuous and efficacious manner in all communications with consumers.

{¶ 20} Nonetheless, the Commission finds that issues regarding Suvon's use of the trade name and compliance with corporate separation requirements by FirstEnergy Corp. affiliates are best raised in other proceedings, specifically the ongoing review of the corporate separation audit of the three FirstEnergy Utilities in the *Corporate Separation Audit Case*. OCC and NOPEC have cited the auditor's report filed in that proceeding, but the Commission has not adopted that report at this time, and the finding and conclusions of the auditor should be litigated in that proceeding rather than this case. We also note that, in its response to Suvon's April 1, 2020 supplemental filing, 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. *Corporate Separation Audit Case*, Audit Report (May 14, 2019) at 19-37, 101-121.

{¶ 21} Therefore, the Commission finds that, pursuant to R.C. 4928.17, the only relevant issues in this certification proceeding are whether Suvon has the managerial, technical and financial capability to be a CRES broker/aggregator in this state. Staff has

thoroughly reviewed Suvon's managerial, technical and financial capability and has recommended that Suvon's application should be approved. Upon review of the many motions and memoranda filed in this case, we find that no other parties have raised material issues regarding Suvon's managerial, technical and financial capability. NOPEC's response to the April 7, 2020 Staff review and recommendation, faulting Staff for failing to address the "key corporate separation issues in this case," aptly demonstrates that NOPEC's sole focus is upon compliance with the corporate separation requirements rather than Suvon's managerial, technical and financial capability. Moreover, we specifically reject arguments which seek to cast questions regarding compliance with the corporate separation statute and rules as evidence of a lack of managerial, technical and financial capability. Finally, we are not persuaded by OCC and NOPEC's assertion that use of shared service employees is per se unlawful; OCC and NOPEC have failed to identify any statute, Supreme Court precedent, or Commission ruling in support of this overly broad claim. To the contrary, shared service arrangements are authorized by Federal law.

{¶ 22} Upon review of all of the filings in this case, we find that no party has raised any issues which materially dispute Staff's determination that Suvon has demonstrated the managerial, technical and financial capability to function as a CRES power broker and aggregator in this state. Accordingly, we find that Suvon's application should be approved. We further find that no hearing is necessary in this proceeding.

C. Motions for a Protective Order and to Compel

{¶ 23} On March 17, 2020, Suvon filed a motion for a protective order. In its motion, Suvon contends that discovery is premature. Subsequently, on March 20, 2020, NOPEC filed a motion to compel discovery. NOPEC filed a memorandum contra the motion for a protective order on April 1, 2020. Suvon filed a memorandum contra the motion to compel on April 6, 2020. Replies to the memorandum contra were filed on April 8, 2020, and April 13, 2020, by Suvon and NOPEC respectively. OCC also filed a motion to compel discovery on April 17, 2020.

{¶ 24} Suvon contends that discovery is premature at this point in the proceeding because no hearing or procedural schedule has been established by the Commission. Suvon also argues that NOPEC's discovery requests are not reasonably calculated to lead to the discovery of admissible evidence; Suvon claims that Ohio Adm.Code 4901:1-24-10(B) determines the scope of this case and does not provide for automatic discovery from intervenors. NOPEC contends that the failure to respond to discovery demonstrates that Suvon lacks the managerial, technical and financial capability to be a CRES provider. NOPEC further contends that Commission rules and precedent permit discovery before a case is set for hearing, citing a recent ruling by the Commission in similar circumstances. *In re Verde USA Ohio, LLC*, Case Nos. 11-5886-EL-CRS et al. (*Verde*), Entry (Mar. 3, 2020).

{¶ 25} The Commission finds that NOPEC's reliance upon the ruling in *Verde* is misplaced. The facts and circumstances surrounding the renewal application in *Verde* are substantially different from the facts in this case, including the fact that, although no decision was made on whether to set the matter for hearing, the attorney examiner did establish a procedural schedule and comment period. Nonetheless in light of our determination that Suvon has the managerial, technical and financial capability to serve as a CRES power broker and aggregator and our determination that no hearing is necessary in this proceeding, we find that the motion for a protective order filed by Suvon and the motions to compel filed by NOPEC and OCC are moot and should be denied.

IV. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That Suvon's application be approved. It is, further,

{¶ 28} ORDERED, That the motions to intervene filed by NOPEC, Vistra, NOAC, Palmer, EPO, RESA and IGS be granted. It is, further,

{¶ 29} ORDERED, That the motion for a protective order filed by Suvon be denied. It is, further,

{¶ 30} ORDERED, That the motions to compel filed by NOPEC and OCC be denied.
It is, further,

{¶ 31} ORDERED, That a copy of this Finding and Order be served upon all parties
of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

GAP/hac

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4/22/2020 3:54:03 PM

in

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

Summary: Finding & Order approving the application for certification as a competitive retail electric service power broker and aggregator filed by Suvon, LLC d/b/a FirstEnergy Advisors. electronically filed by Ms. Mary E Fischer on behalf of Public Utilities Commission of Ohio