

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Initial Certification	)	
Application of Suvon, LLC d/b/a FirstEnergy	)	
Advisors to Provide Aggregation and Broker	)	Case No. 20-103-EL-AGG
Services in the State of Ohio.	)	

---

**NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S  
APPLICATION FOR REHEARING**

---

Glenn S. Krassen (Reg. No. 0007610)  
BRICKER & ECKLER LLP  
1001 Lakeside Avenue, Suite 1350  
Cleveland, OH 44114  
Telephone: (216) 523-5405  
Facsimile: (216) 523-7071  
E-mail: gkrassen@bricker.com

Dane Stinson (0019101)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
Telephone: (614) 227-4854  
Facsimile: (614) 227-2390  
Email: dstinson@bricker.com

Attorneys for Northeast Ohio Public Energy  
Council

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
I. HISTORY OF THE PROCEEDING.....	3
II. INTRODUCTION .....	6
III. STANDARD OF REVIEW .....	11
IV. GROUNDS FOR REHEARING .....	11
A. The Order violates R.C. 4903.09 because the Commission failed to make findings of fact to support its approval of FirstEnergy Advisor’s application.....	11
B. The Commission unlawfully shifted the burden of proof to the intervenors by requiring them to show that the application should not be granted. ....	13
C. The Commission abused its discretion by failing to consider in this certification case whether FirstEnergy Advisors’ management structure and use of the “FirstEnergy” name violated the Commission’s corporate separation rules. O.A.C. 4901:1-24-10(A)(2)(c) and 4901:1-24-10(C)(2).....	13
D. The Commission’s denial of NOPEC’s discovery rights was unlawful. When a certification proceeding has been suspended based upon information provided by an intervening party, and the intervening party’s intervention is unopposed, the intervenor has the right to discovery. R.C. 4903.082, O.A.C. 4901-1-17(A).....	15
E. The Commission erred by failing to find in this certification case that FirstEnergy Advisors lacks the managerial capability to provide service. FirstEnergy Advisors has not identified a management team that is compliant with the Commission’s corporate separation rules. R.C. 4928.08, 4928.17 and O.A.C. 4901:1-24-10(C)(2), 4901:1-37-04.....	17
F. The Commission erred by failing to find in this certification case that FirstEnergy Advisors’ use of the “FirstEnergy” name violates Ohio’s electric utility corporate separation laws. O.A.C. 4901:1-24-10(C)(2) and 4901:1-37-04(D)(7).....	19
V. CONCLUSION.....	21
CERTIFICATE OF SERVICE .....	23

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Initial Certification )	
Application of Suvon, LLC d/b/a FirstEnergy )	
Advisors to Provide Aggregation and Broker )	Case No. 20-103-EL-AGG
Services in the State of Ohio. )	

---

**NORTHEAST OHIO PUBLIC ENERGY COUNCIL’S  
APPLICATION FOR REHEARING**

---

The Northeast Ohio Public Energy Council (“NOPEC”), through counsel and pursuant to R.C. 4903.10, and O.A.C. 4901-1-35, requests rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio (“Commission”) in this proceeding on April 22, 2020 (“Order”). NOPEC submits that the Commission’s Order is unlawful, unreasonable and/or an abuse of discretion based on the following grounds:

- A. The Order violates R.C. 4903.09 because the Commission failed to make findings of fact to support its approval of FirstEnergy Advisor’s application.**
- B. The Commission unlawfully shifted the burden of proof to the intervenors by requiring them to show that the application should not be granted.**
- C. The Commission abused its discretion by failing to consider in this certification case whether FirstEnergy Advisors’ management structure, and use of the “FirstEnergy” name, violated the Commission’s corporate separation rules. O.A.C. 4901:1-24-10(A)(2)(c) and 4901:1-24-10(C)(2).**
- D. The Commission’s denial of NOPEC’s discovery rights was unlawful. When a certification proceeding has been suspended based upon information provided by an intervening party, and the intervening party’s intervention is unopposed, the intervenor has the right to discovery. R.C. 4903.082, O.A.C. 4901-1-17(A).**
- E. The Commission erred by failing to find in this certification case that FirstEnergy Advisors lacks the managerial capability to provide service. FirstEnergy Advisors has not identified a management team that is compliant with the Commission’s corporate separation rules. R.C. 4928.17, O.A.C. 4901:1-24-10(C), 4901:1-37-04.**
- F. The Commission erred by failing to find in this certification case that FirstEnergy Advisors’ use of the “FirstEnergy” name violates Ohio’s electric utility corporate separation laws. O.A.C. 4901:1-24-10(C)(2) and 4901:1-37-04(D)(7).**

---

## MEMORANDUM IN SUPPORT

---

### **I. HISTORY OF THE PROCEEDING**

The Northeast Ohio Public Energy Council (“NOPEC”) moved to intervene in this proceeding on February 10, 2020, to contest Suvon, LLC d/b/a FirstEnergy Advisors’ (“FirstEnergy Advisors”) certification application. FirstEnergy Advisors did not oppose NOPEC’s motion, which the Commission granted.

On February 10, 2020, NOPEC, jointly with the Office of the Ohio Consumers’ Counsel (“OCC”), filed a motion to suspend the application to conduct further investigation, hold a hearing, and ultimately deny the application as proposed (“Joint Motion”). NOPEC asked the Commission to deny the application because FirstEnergy Advisors had not identified a management team that had the capability to provide service and comply with applicable law, including Ohio’s electric utility corporate separation laws. R.C. 4928.08, 4928.17 and O.A.C. 4901:1-24-10(C)(1) and (2), 4901:1-37-04. NOPEC and OCC supported their motion with the public information that was available regarding FirstEnergy Advisors’ management team and those of its affiliates. The Joint Motion also opposed FirstEnergy’s use of the “FirstEnergy” name because it violated other corporate separation laws, specifically O.A.C. 4901:1-37-04(7) and (8). Based upon the Joint Motion, the Commission suspended the application the following day.

Although NOPEC and OCC supported their request to suspend the application with available public information, NOPEC also served discovery on FirstEnergy Advisors in order to present additional evidence to the Commission regarding FirstEnergy Advisors’ noncompliance with the law. FirstEnergy Advisors refused to respond, forcing NOPEC to file a motion to compel on March 20, 2020.

On April 22, 2020, the Commission issued its Finding and Order in this proceeding (the “Order”). The Order approved the application based upon FirstEnergy Advisors’ ministerial completion of the certification application form, without asking for formal comments,<sup>1</sup> holding a hearing or making findings or analyses of whether FirstEnergy Advisors was compliant with Ohio’s corporate separation law, as required by R.C. 4903.09.

The Order also denied NOPEC’s motion to compel discovery as moot. Despite preventing NOPEC (and at least one other party, OCC) from engaging in discovery, the Commission then granted FirstEnergy Advisors’ application on the basis that neither NOPEC nor the seven other intervenors<sup>2</sup> in this case “raised material issues regarding Suvon’s managerial, technical and financial capability.” Order at 7. The Commission effectively shifted the burden of proof in this certification case from the applicant (where it belongs) to NOPEC and the intervenors.

The Commission could and should have allowed for discovery and ordered a public hearing in this certification proceeding, and its failure to do so was both unlawful and an abuse of discretion. Instead, the Order punted consideration of NOPEC’s allegations that FirstEnergy Advisors was not compliant with Ohio’s corporate separation law to the FirstEnergy electric distribution utilities’ (“EDUs”) long-pending audit of its corporate separation plan.<sup>3</sup> By entry of April 29, 2020 in the Audit Case, the Commission called for supplemental and reply comments to address the allegations that were raised in the instant certification case. Supplemental comments will not remedy the errors it has made in this certification case. By issuing its Order without public hearing to resolve

---

<sup>1</sup> Indeed, the Order rejected comments that OCC had voluntarily submitted on the basis they were untimely under R.C. 4928.08(B). The rejection was unwarranted and an abuse of discretion because the Commission had tolled the statute’s 90-day time limitation. See Case No. 20-591-AU-UNC at 3. The Commission scarcely considered some of the voluntary comments NOPEC submitted in its April 14, 2020 Response to Staff’s Recommendation.

<sup>2</sup> The intervenors represent a broad and diverse spectrum of stakeholders in Ohio’s competitive retail electric services industry and include: NOPEC, OCC, Retail Energy Supply Association, Palmer Energy Company, Interstate Gas Supply, Vistra Energy Corp. and its subsidiaries, the Northwest Ohio Aggregation Coalition, and Energy Professionals of Ohio. All of the intervenors opposed the application, and most requested the Commission to hold a hearing in the case.

<sup>3</sup> See Case No. 17-974-EL-UNC, Entry (April 29, 2020) (“Audit Case”).

extremely material corporate separation issues, the Commission has permitted FirstEnergy Advisors to operate under the “FirstEnergy” name and its management team to learn the regulated EDUs’ nonpublic information on an instantaneous basis (and vice versa). Nonpublic information necessarily is exchanged instantaneously because both management teams are the same people, and all are housed in the same utility headquarters’ office building. The Commission’s call for supplemental comments in the Audit Case is “way too little too late.” Harm and prejudice already have attached to the intervening parties.

Importantly, the independent audit prepared in the Audit Case focused on the relationship between the EDUs and their now-defunct affiliate, FirstEnergy Solutions Corp. (“FES”). The parties will not be aided by a similar audit of FirstEnergy Advisors’ relationship with the EDUs. Indeed, the only additional information added to the record for comment in the Audit Case is the application and self-serving supplement that FirstEnergy Advisors provided in this certification proceeding. The attorney examiner already has taken administrative notice of the documents, *sua sponte*.<sup>4</sup> In effect, the Commission is permitting FirstEnergy Advisors to audit itself. The process in the Audit Case lacks fundamental fairness. No reason exists to transfer information to the Audit Case that the Commission can, and should, rule on in this proceeding.

NOPEC urges the Commission to address the intervenors’ valid and material concerns about FirstEnergy Advisors’ compliance with Ohio’s corporate separation laws through a public hearing in this proceeding. Indeed, the Commission should suspend FirstEnergy Advisors’ certificate and its use of the “FirstEnergy” name until these issues are resolved in a transparent public process with discovery and a public hearing, not in secret meetings behind closed doors.

---

<sup>4</sup> See Audit Case at 3.

## II. INTRODUCTION

The Ohio General Assembly enacted Amended Substitute Senate Bill 3 (“SB 3”) in 1999 to open Ohio’s monopoly electricity market to competitive retail generation service. It recognized that, for deregulation to work for the benefit of consumers, customers should have access to reasonably priced electric service with a diversity of supply.<sup>5</sup> To achieve that goal, captive monopoly consumers had to be protected against incumbent utilities’ potential market power abuses.<sup>6</sup>

To prevent abuse impacting the market and consumers, the General Assembly directed each utility to file a corporate separation plan for the PUCO’s approval. The plan was to achieve each of the following:

- (1) The provision of the CRES and Non-Electric services or products through a *fully separated affiliate* of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.<sup>7</sup>
- (2) Satisfy the public interest in preventing unfair competitive advantage and *preventing the abuse of market power*.
- (3) 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 CRES or Non-Electric product or service,

FirstEnergy Corp’s (“FEC”) power marketing subsidiary, FES, was certified by the Commission in 2000, filed bankruptcy in 2018, and emerged from bankruptcy on February 27, 2020 as Energy Harbor LLC. During FES’s final transition to Energy Harbor, another FEC subsidiary, Suvon, LLC, filed the instant application with the Commission on January 17, 2020, to provide

---

<sup>5</sup> Ohio Rev. Code 4928.02(C).

<sup>6</sup> Ohio Rev. Code 4928.02(I).

<sup>7</sup> There was a limited exception allowing utilities, for good cause shown, to have a functional separation plan on an interim basis. See R.C. 4928.17(C).

power brokerage and aggregation services in Ohio. It also proposed to use the “FirstEnergy” name and provide service as “FirstEnergy Advisors.”

Although FES was first certified to provide competitive retail electric service (“CRES”) in Ohio in 2000,<sup>8</sup> in the nearly 20 years since, the Commission never has undertaken a detailed review to ensure that the FirstEnergy EDUs<sup>9</sup> were complying with the Commission’s corporate separation rules.<sup>10</sup> As a part of its Investigation of Ohio’s Retail Electric Service Market in 2012,<sup>11</sup> the Commission found that “it is imperative that utility and affiliate activities undergo vigilant monitoring in order to ensure their compliance with Ohio Rev. Code 4928.17 and Ohio Adm. Code 4901:1-37, and in order to further Ohio’s policies pursuant to Ohio Rev. Code 4928.02.”<sup>12</sup>

On April 12, 2017, the Commission opened the audit of the FirstEnergy EDUs’ separation plan as directed by the Commission’s *Market Investigation*. The independent auditor filed its report over two years ago, on May 14, 2018.<sup>13</sup> Among other defects, the auditor found that it was improper to comingle executive management from FES’s sales division as part of the senior leadership team of FirstEnergy’s Service Company. The auditor found that FirstEnergy Service Company “primarily serves the FirstEnergy regulated operating companies,” and that it was “problematic” for the FES vice president to attend Service Company executive meetings with other Service Company executives who were focused on the regulated utility operations.<sup>14</sup> The auditor also recommended that the “FirstEnergy” name be removed from FES’s name, noting that “[u]sing

---

<sup>8</sup> See Case No. 00-1742-EL-CRS.

<sup>9</sup> The FirstEnergy EDUs are The Cleveland Electric Illuminating Company, The Ohio Edison Company, and Ohio Edison Company.

<sup>10</sup> See Joint Motion to Suspend this application filed February 10, 2020 (“Joint Motion”) at 6-7.

<sup>11</sup> See Case No. 12-3151-EL-COI, Finding and Order (March 26, 2014) (“*Market Investigation*”).

<sup>12</sup> *Id.* at 16.

<sup>13</sup> See Case No. 17-974-EL-UNC, SAGE Management Consultants, LLC Final Report for Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio (May 14, 2018) (“Audit Report”) at 98-99.

<sup>14</sup> Audit Report at 39.



‘FirstEnergy’ in the Ohio Companies’ CRES affiliate’s name, ‘FirstEnergy Solutions’ implies an endorsement by the FirstEnergy Ohio Companies. Should FES continue to be a CRES provider in Ohio, it should have a different name that does not include ‘FirstEnergy’ or any other name that implies a connection to the Ohio Companies.”<sup>15</sup> The Auditor’s recommendation was intended to “eliminate affiliate bias.”<sup>16</sup>

The auditor was aware of the likelihood that FEC could fully divest FES in the near future and the corporate separation violations it found could become moot. The Audit Report’s observation proved correct as to FES (n/k/a Energy Harbor), but it did not predict the establishment of the new subsidiary, FirstEnergy Advisors. The Audit Report was noticeably concerned that information could be shared between the FirstEnergy EDUs and a single FES executive. This concern is exacerbated exponentially in this proceeding, considering that practically the entire management teams for the EDUs and FirstEnergy Advisors have the ability to share nonpublic information instantaneously with each other because their managers, officers and directors are the same people and are housed in the same utility headquarters’ office building in downtown Akron.

Although the Audit Report does not consider the EDUs’ compliance with corporate separation laws as to FirstEnergy Advisors, it nevertheless is very instructive in this proceeding as a tool for the Commission to assess FirstEnergy Advisor’s required compliance with Ohio law. O.A.C. 4901:1-24-10(C). Indeed, with the Audit Report looming in the background, and FES’s divestiture completed, it would have been prudent for the Commission to resolve these issues before it permitted a newly established FEC subsidiary to operate to the potential harm of stakeholders in Ohio’s competitive retail electric service industry and the consumers they serve. However, the Order failed to thoroughly address NOPEC’s and all of the other intervening parties’ concerns

---

<sup>15</sup> Audit Report at 98; see, also, O.A.C. 4901:1-37-04(D)(7).

<sup>16</sup> Audit Report at 46

whether FirstEnergy Advisors and its affiliated EDUs were compliant with the Commission's corporate separation rules. Moreover, the Order was issued without formal comments or hearing, thus lacking the transparency of a public process.

Although the Order is not clear, it appears that the Commission considers its approval of certification applications to be a purely ministerial function involving the completion of forms, with no need to inquire whether an applicant is currently compliant with Commission rules.<sup>17</sup> NOPEC completely disagrees. See O.A.C. 4901:1-24-10(C)(2). The Commission found:

[T]he Commission finds that, pursuant to R.C. 4928.17 [sic<sup>18</sup>], 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.

Order at 7.

The Order does not disclose what the Commission considers in determining whether an applicant has the necessary managerial capability to provide service. Instead, it relied on Staff's recommendation filed April 7, 2020. Staff's complete analysis of FirstEnergy Advisors' application, as amended, consists of the following two paragraphs, with only two conclusory sentences (*italicized*) purporting to explain the scope of its review.

On January 17, 2020, Suvon, LLC dba FirstEnergy Advisors (FE Advisors) filed an application seeking authority to operate in Ohio as a power broker and

---

<sup>17</sup> The harm from certifying applicants not in compliance with Ohio law is self-evident. An unfit applicant affects the public convenience and is the justification behind promulgating O.A.C. 4901:1-24-10(C)(2).

<sup>18</sup> The Commission apparently meant to refer to R.C. 4928.08.

aggregator. By Entry dated February 11, 2020, this certification application was suspended in order to give the Commission and Staff additional time to review this matter. The certification application was amended on April 1, 2020. ***FE Advisors has answered all applicable sections and provided all required exhibits as listed on the application form. In addition, FE Advisors has stated that it intends to comply with all commission rules.***

Commission Staff is required to evaluate an applicant based on its managerial, technical, and financial capabilities 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 Ohio Revised Code. Staff has thoroughly reviewed and evaluated this application, accompanying exhibits, and amendments. Based on this review, Staff believes the application filed by Suvon, LLC dba FirstEnergy Advisors on January 17, 2020, as amended on April 1, 2020, is in compliance with Ohio Administrative Code and therefore, Staff recommends that this application be approved. [Emphasis supplied.]

Based on this scanty analysis, the Commission denied NOPEC’s motion to compel discovery, denied public hearing on FirstEnergy Advisors’ managerial capability to provide service, deferred ruling on compliance with corporate separation rules to the Audit Case, and granted the certificate. It found that neither NOPEC nor the other seven intervening opposing parties had “raised any issues which materially dispute Staff’s determination that Suvon [FirstEnergy Advisors] has the managerial, technical and financial ability to function as a CRES power broker and aggregator in this state.”<sup>19</sup>

The Order is unlawful, unreasonable and/or an abuse of discretion in the following respects:

- A. The Order violates R.C. 4903.09 because the Commission failed to make findings of fact to support its approval of FirstEnergy Advisor’s application.**
- B. The Commission unlawfully shifted the burden of proof to the intervenors by requiring them to show that the application should not be granted.**
- C. The Commission abused its discretion by failing to consider in this certification case whether FirstEnergy Advisors’ management structure and use of the “FirstEnergy” name. O.A.C. 4901:1-24-10(A)(2)(c) and 4901:1-24-10(C)(2).**
- D. The Commission’s denial of NOPEC’s discovery rights was unlawful. When a certification proceeding has been suspended based upon information provided**

---

<sup>19</sup> Order at 7.

by an intervening party, and the intervening party's intervention is unopposed, the intervenor has the right to discovery. R.C. 4903.082, O.A.C. 4901-1-17(A).

- E. The Commission erred by failing to find in this certification case that FirstEnergy Advisors lacks the managerial capability to provide service. FirstEnergy Advisors has not identified a management team that is compliant with the Commission's corporate separation rules. R.C. 4928.08, 4928.17 and O.A.C. 4901:1-24-10(C)(2), 4901:1-37-04.
- F. The Commission erred by failing to find in this certification case that FirstEnergy Advisors' use of the "FirstEnergy" name violates Ohio's electric utility corporate separation laws. O.A.C. 4901:1-24-10(C)(2) and 4901:1-37-04(D)(7).

### III. STANDARD OF REVIEW

In considering an application for rehearing, R.C. 4903.10 provides that the Commission may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the Commission may "abrogate or modify" the order in question if the Commission "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."<sup>20</sup>

Rehearing is warranted in this proceeding because the Order is unjust, unreasonable, unlawful, and/or an abuse of discretion. See *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384 (2006) (an abuse of discretion standard governs permissive decisions).

### IV. GROUNDS FOR REHEARING

- A. The Order violates R.C. 4903.09 because the Commission failed to make findings of fact to support its approval of FirstEnergy Advisor's application.

R.C. 4903.09 provides:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

---

<sup>20</sup> R.C. 4903.10(B).

The Commission granted all eight intervenors' motions to intervene in this proceeding and addressed comments NOPEC filed in its April 14, 2020 Response to Staff's Recommendation. Thus, this is a contested case heard by the Commission. See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 311, 513 N.E.2d 337 ("*MCI*") (R.C. 4903.09 applies to Commission Finding and Orders even though a formal evidentiary hearing is not held.). However, the Commission made no findings that support its determination that FirstEnergy Advisors had the managerial capability to provide service or to comply with Ohio law. R.C. 4928.08 and O.A.C. 4901:1-24-10(C)(2). Instead, it merely relied on Staff's recommendation, which itself made no factual determinations that support Staff's scant recommendation to grant the application. The only "substantive" information Staff provided in its recommendation was that:

FE Advisors has answered all applicable sections and provided all required exhibits as listed on the application form. In addition, FE Advisors has stated that it intends to comply with all commission rules. [Staff Recommendation, Paragraph 1 of 2.]

The Ohio Supreme Court construed R.C. 4903.09 in *MCI* at 343, stating:

The purpose of R.C. 4903.09 (formerly G.C. 614-46a), as stated by this court in *Commercial Motor Freight, Inc. v. Pub. Util. Comm.* (1951), 156 Ohio St. 360, 363-364, 46 O.O. 210, 211-212, 102 N.E.2d 842, 844-845, is:

‘ \* \* \* to enable this court to review the action of the commission without reading the voluminous records in Public Utilities Commission cases. Where the commission states the facts found upon which it bases its decision, this court can usually readily determine, as it is required to do by Section 544, General Code [now R.C. 4903.13], whether the order of the commission is “unlawful or unreasonable.” A review of the essential facts so found can also be made with the help of record references supplied by opposing counsel in their briefs. *The General Assembly never intended this court to perform the same functions and duties as the Public Utilities Commission but it did intend that this court should determine whether the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order and whether the evidence presented to the commission as found in the record supported the essential findings of fact so made by the commission.*’ \* \* \* (Emphasis sic.)

Not only is the Order legally insufficient for the Court to perform its review under R.C. 4903.13, it prejudices NOPEC on rehearing by failing to set forth the specific facts upon which the Commission approved FirstEnergy Advisors' application. The Commission's error should be corrected by ordering a hearing to develop a sufficient factual basis upon which the Commission, and the Court, can render their decisions.

**B. The Commission unlawfully shifted the burden of proof to the intervenors by requiring them to show that the application should not be granted.**

Instead of providing the factual bases upon which it approved FirstEnergy Advisor's certification application, the Commission's Order devotes its time to criticizing the intervenors for failing to raise "material issues" to refute that FirstEnergy Advisors possesses the managerial, technical and financial ability to provide service, or comply with the law. Order at 7. By requiring NOPEC and the intervenors to show that FirstEnergy Advisors lacked this capability (while denying their right to discovery, no less), the Commission unlawfully shifted the burden of proof from FirstEnergy Advisors. The burden of proof is upon the applicant in a certification proceeding to show that it has the managerial, technical and financial ability to provide service and comply with all Commission rules. See R.C. 4928.08 and O.A.C. 4901:1-24-10(C)(2). The application should be denied because FirstEnergy Advisors failed in its burden. Alternatively, the Commission's error should be corrected by conducting a public hearing, with full discovery rights, so that FirstEnergy Advisors can provide evidence, subject to cross examination, as to how it is in compliance with the Commission's corporate separation rules.

**C. The Commission abused its discretion by failing to consider in this certification case whether FirstEnergy Advisors' management structure and use of the "FirstEnergy" name violated the Commission's corporate separation rules. O.A.C. 4901:1-24-10(A)(2)(c) and 4901:1-24-10(C)(2).**

As stated above, the Order views the inquiry into an applicant's managerial capability in certification proceedings as being distinct from the management review under the corporate

separation rules. The Commission adopted Staff's view that approval of managerial capability in a certification case is a ministerial function, and should be approved as long as the applicant has answered all of the questions on the application form. See Staff Recommendation, Paragraph 1 of 2; Order at 7. However, O.A.C. 4901:1-24-10(C) sets the criteria for approval of certification applications and requires much more. It provides:

The commission will act to approve an application if it finds that all of the following are true:

(1) The applicant is managerially, financially, and technically fit and capable of performing the service it intends to provide.

***(2) The applicant is managerially, financially, and technically fit and capable of complying with all applicable commission rules and orders.***

(3) The applicant is able to provide reasonable financial assurances sufficient to protect electric distribution utility companies and the customers from default.

Emphasis supplied.

Consideration of whether an applicant is fit and capable of complying with all applicable Commission rules necessarily depends on whether the applicant currently is in compliance with them. Despite the Order's findings to the contrary, NOPEC, OCC and the other parties to this proceeding raised "material issues" as to whether FirstEnergy Advisors was compliant with "all applicable commission rules" by reason of its comingled management and control structure with its regulated EDU affiliates, and also by using the "FirstEnergy" name. These issues were "material" enough that the independent Audit Report conducted in the Audit Case recommended that FirstEnergy Service Company's management activities be changed and that FES no longer use the "FirstEnergy" name. The issues were material enough that Staff suspended FirstEnergy Advisors' application the day after NOPEC and OCC brought these rules violations to Staff's attention. The issues were also material enough that the Commission has now called for supplemental comments to address them in the FirstEnergy EDU's Audit Case.

Whether FirstEnergy Advisors was compliant with the Commission's corporate separation rules also was material enough that the Commission was required to consider them in this proceeding, before permitting FirstEnergy Advisors to operate. O.A.C. 4901:1-24-10(A)(2)(c). The Commission flagrantly abused its discretion by failing to do so. Upon proper review on rehearing, NOPEC urges the Commission to either (1) deny FirstEnergy Advisors' application for failing to install a management team capable of operating the company without violating Ohio's corporate separation laws, or (2) order the hearing warranted by O.A.C. 4901:1-24-10(A)(2)(c), after permitting ample time for discovery.

**D. The Commission's denial of NOPEC's discovery rights was unlawful. When a certification proceeding has been suspended based upon information provided by an intervening party, and the intervening party's intervention is unopposed, the intervenor has the right to discovery. R.C. 4903.082, O.A.C. 4901-1-17(A).**

The Commission's Order denied NOPEC's motion to compel discovery, and thus denied NOPEC the ability to support its allegations that FirstEnergy Advisors lacked the capability to provide service and comply with Ohio law, to NOPEC's extreme, unfair and unlawful prejudice. See, Order at 7-8. The Order suggests that the Commission must first set a procedural schedule before discovery can commence. The Order is contrary to Commission precedent, and the Commission has not explained its departure from that precedent.

The Commission repeatedly has found that discovery can be had prior to its determination whether to hold a hearing. On point is *In re Columbia Gas of Ohio*, Case No. 11-5351-GA-UNC, in which Columbia Gas filed an application not for an increase in rates, pursuant to R.C. 4909.18. Scheduling a hearing in such matters is discretionary. However, the Commission found that intervenors could seek discovery prior to the Commission's determination whether to hold a hearing, stating:

Section 4903.082, Revised Code, requires the Commission to ensure ample rights of discovery, while Rule 4901-1-17(A), O.A.C., generally



provides that discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible.

*Id.*, Entry (January 27, 2012) at 2. See, also, *In re Cleveland Elec. Illum. Co. et al.*, Case No. 07-385-EL-PWC, Entry (April 17, 2007) at 2 (“Although the Commission must still determine if reasonable grounds for complaint have been stated, the parties are reminded that, pursuant to Rule 4901-1-17, O.A.C., discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible.”); accord *In re Cincinnati Gas & Elec. Co. v. City of Lebanon*, Case No. 05-103-EL-PWC, Entry (February 8, 2005) at 2.

NOPEC filed a motion to intervene in this proceeding. FirstEnergy Advisors did not object to NOPEC’s intervention, which ultimately was granted. NOPEC also requested that the Commission suspend FirstEnergy Advisors’ application and conduct a hearing, as permitted under O.A.C. 4901:1-24-10(A)(2)(c). Pursuant the Commission’s rules and above precedent, NOPEC had the right to conduct discovery from the moment it filed its motion to intervene to prepare for hearing, whether a procedural schedule has been scheduled or not. The line of cases cited above is not distinguishable from this case.

On point also is *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Services Supplier, et al.*, Case Nos. 11-5886-EL-CRS and 13-2164-GA-CRS, Attorney Examiner Entry (March 3, 2020) (“*Verde*”). Similar to FirstEnergy Advisors’ arguments, the applicant in *Verde* asserted that efficiency required that discovery not commence until after intervention is granted and a procedural schedule established.<sup>21</sup> The Attorney Examiner rejected *Verde*’s argument and found that an intervenor can commence discovery as soon as a motion to intervene is filed, and prior to the Commission setting a procedural

---

<sup>21</sup> *Id.*, *Verde*’s memorandum contra OCC’s motion to compel (January 10, 2020).

schedule or hearing.<sup>22</sup> The Commission’s Order in this case attempts to distinguish *Verde* on the basis that a procedural schedule was set in that case. The procedural schedule provided only a date by which discovery had to be completed. This discovery end date did not affect *Verde*’s finding that discovery can begin as soon as a motion to intervene is filed. Indeed, to the contrary, *Verde* chastises the parties for not responding to previous discovery requests by requiring that they be provided on an expedited basis.

**E. The Commission erred by failing to find in this certification case that FirstEnergy Advisors lacks the managerial capability to provide service. FirstEnergy Advisors has not identified a management team that is compliant with the Commission’s corporate separation rules. R.C. 4928.08, 4928.17 and O.A.C. 4901:1-24-10(C)(2), 4901:1-37-04.**

Ohio law is clear. No regulated utility can provide competitive retail electric service in Ohio unless it does so through a “fully separated affiliate.” R.C. 4928.17(A)(1). That affiliate must “function independently” of the regulated utility. O.A.C. 4901:1-37-04(A)(1) and (3). These provisions are intended to prevent the regulated utility from abusing its market power and to preserve fair competition in the retail electric market.

In NOPEC and OCC’s Joint Motion filed February 10, 2020, and their Reply Memorandum filed February 25, 2020, as well as in NOPEC’s Response to FirstEnergy Advisors’ Supplemental Application filed April 14, 2020 (“Response”), NOPEC showed that the comingling of a key management position under the FirstEnergy Corp structure violates the corporate separation rules. This is because the competitive entity would be privy to the regulated entity’s information (and vice versa) through interaction with each other, including interactions associated with both entities use of FirstEnergy Service Company.

Under FirstEnergy Advisors’ application, all three of FirstEnergy Advisors’ managers hold the highest level executive positions with FirstEnergy Corp. and FirstEnergy Services Company.

---

<sup>22</sup> *Id.*, ¶ 13.

Moreover, two of FirstEnergy Advisors’ managers also are directors of the regulated First Energy EDUs.

<b>COMMON MANAGERS/DIRECTORS/EXECUTIVE OFFICERS</b>		
FirstEnergy Corp/FirstEnergy Service Company <sup>23</sup>	FirstEnergy Advisors <sup>24</sup>	Regulated Utilities <sup>25</sup>
Charles Jones, CEO, Pres FE Utilities (FEC)	Charles Jones, Manager	Charles Jones Director
D.M. Chack, Pres. FE Ohio Utilities (FEC) Sr. VP Mktng/Branding (FESC)	D.M. Chack, Manager	
S.E. Strah, Sr. VP (FEC) CFO (FESC)	S.E. Strah, Manager	S.E. Strah Director
		J.E. Pearson, Director
		S.L. Belcher, Director

This commonality of management control is so pervasive that it is impossible for FirstEnergy Advisors to “function independently” from the Regulated Utilities. Indeed, joint management control is so pervasive that it violates R.C. 4928.17, *per se*.

For this reason, FirstEnergy Advisors is unable to conduct business in Ohio using the management team proposed in its Application. Because the Application fails to identify an appropriate management team, the Commission erred by finding that FirstEnergy Advisors has the managerial capability to provide competitive retail electric service in Ohio. R.C. 4928.08(B); 4901:1-24-10(C)(2). For this reason, the Commission should deny the application without further hearing.

The Commission’s Order does not fully address whether FirstEnergy Advisors’ management structure violates Ohio’s corporate separation laws. Rather, it improperly attempts to defer that determination to the Audit Case, as discussed above. See Order at 6. However, the Commission does remark:

---

<sup>23</sup> See [firstenergycorp.com/investor/corporate\\_governance/officers\\_and\\_directors.html](http://firstenergycorp.com/investor/corporate_governance/officers_and_directors.html); [investors.firstenergy.com](http://investors.firstenergy.com)

<sup>24</sup> See Suvon Initial Certification Application, Case No. 20-103-EL-CRS, Exhibit A-12 (January 17, 2020).

<sup>25</sup> See Companies’ Annual Reports, 2018 4Q FERC Form 1.

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. [Order at 7. Emphasis supplied.]

The statement mischaracterizes NOPEC's position. NOPEC recognizes that, under Ohio law, certain employees may be shared and their costs recorded in the cost allocation manual. However, sharing is not permitted when it would violate code of conduct provisions contained in O.A.C. 4901:1-37-04(D). See O.A.C. 4901:1-37-04(A)(4). Sharing the same management teams as proposed by FirstEnergy Advisors would violate O.A.C. 4901:1-37-04(D)(4), (6) and (8). See NOPEC's Response at 6-7. In that sense, the shared management structure proposed is a "per se" violation of the corporate separation rules. Moreover, the Commission erred to the extent it relies on "Federal law." Federal law, presumably Federal Energy Regulatory Commission regulations, does not control Ohio's retail electric markets. R.C. 4928.17 and the regulations promulgated under Ohio law control.

**F. The Commission erred by failing to find in this certification case that FirstEnergy Advisors' use of the "FirstEnergy" name violates Ohio's electric utility corporate separation laws. O.A.C. 4901:1-24-10(C)(2) and 4901:1-37-04(D)(7).**

FirstEnergy Advisors also should not be permitted to conduct business in Ohio under the "FirstEnergy" brand name. As explained in the Joint Motion, FirstEnergy Advisors' use of the regulated EDUs' name violates O.A.C. 4901:1-37-04(D)(7),<sup>26</sup> and also is unfair and misleading, in violation of R.C. 4928.10, O.A.C. 4901:1-21-03(A), and O.A.C. 4901:1-37(D)(8). See Reply at 10-12.

Although the Commission improperly deferred consideration of this issue to the Audit Case, it also stated that use of a regulated affiliate's trade name is not a new or novel issue and listed a string of cases in which the use was permitted. To the contrary, this case presents a matter of first

---

<sup>26</sup> Joint Motion at 15-17

impression for the Commission. Although other cases have focused on whether use of the same brand name was unfair, misleading or deceptive (it is), the issue in this case is whether the use of the FirstEnergy name violates corporate separation standards, namely O.A.C. 4901:1-37-04(D)(7).<sup>27</sup> That section prohibits the electric utility from endorsing any CRES provider that is an affiliate.

The Audit Report similarly concluded that, by virtue of using the name “FirstEnergy Solutions,” it is impossible for the regulated utilities’ representatives *not* to “indicate” that FirstEnergy Solutions is an affiliate, because they share a common name. (Audit Report, at 98.) Indeed, by virtue of their widespread branding program the regulated utilities effectively are “endorsing” their competitive affiliate over other electric suppliers. *Id.*

It also is important to note that the precedent for permitting EDU-affiliated electric suppliers to use the utility name was created in a case where the affiliates had been using the utilities’ name for a number of years. The Commission reasoned that to require the affiliated supplier to change its name would result in customer confusion.<sup>28</sup> Here, however, FirstEnergy Advisors is brand spanking new—it has yet to commence service. Requiring it to operate under a different name not linked to FirstEnergy will not confuse customers. Indeed, it will eliminate confusion for customers who may be misled into believing they are being served by their regulated utility, or even by the now-defunct FES. It is imperative to require the name change before service begins.

Although the Commission deferred the branding issue to the Audit Case, it also placed its imprimatur on FirstEnergy Advisors’ use of the following disclaimer on marketing and advertising materials:

---

<sup>27</sup> O.A.C. 4901:1-37-04(D)(7) provides:

(7) The electric utility, upon request from a customer, shall provide a complete list of all competitive retail electric service providers operating on the system, but shall not endorse any competitive retail electric service providers, indicate that an electric services company is an affiliate, or indicate that any competitive retail electric service provider will receive preference because of an affiliate relationship.

<sup>28</sup> See *In Re Review of Chapter 4901:1-20, Ohio Administrative Code*, Case No. 04-48-EL-ORD, Finding and Order (July 28, 2004) at 9 (“Case No.04-48”).

Suvon, LLC, d/b/a FirstEnergy Advisors, is an unregulated subsidiary of FirstEnergy Corp. Suvon, LLC d/b/a FirstEnergy Advisors, is not the same company as FirstEnergy Corp. The prices of Suvon, LLC, d/b/a FirstEnergy Advisors, products and services are not regulated by the state utility commissions. You do not have to purchase any product and/or service from Suvon, LLC, d/b/a FirstEnergy Advisors, in order to receive the same regulated services from FirstEnergy Corp.'s regulated electric utilities – Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, West Penn Power Company, Pennsylvania Power Company, Metropolitan Edison Company, Jersey Central Power & Light Company, Monongahela Power Company, the Potomac Edison Company, and American Transmission Systems, Incorporated.

This “disclaimer” does nothing to assuage the independent auditor’s concern that use of the FirstEnergy brand gives an affiliated CRES an unfair preference. In fact, the “disclaimer” actually is another endorsement to choose FirstEnergy Advisors because it a trusted member of the FirstEnergy family. The disclaimer touts that:

1. FirstEnergy Advisors is a subsidiary of FirstEnergy Corp;
2. FirstEnergy Corp’s other subsidiaries include each of the FirstEnergy Ohio EDUs; and
3. Customers will continue to receive the same (good, old, familiar) regulated services from the FirstEnergy Ohio EDUs.

If Suvon, LLC is not “the same company as FirstEnergy Corp,” and is a fully separated affiliate of the EDUs, what benefit does it derive from using the FirstEnergy name, other than the tacit endorsement of the EDUs?

To the extent the Commission approved this disclaimer, the approval was unreasonable.

## **V. CONCLUSION**

NOPEC respectfully requests that the Commission grant its request for rehearing as set forth above and either (1) deny FirstEnergy Advisors’ application or (2) order a public hearing to be conducted after sufficient time for discovery. In addition, NOPEC requests the Commission to suspend FirstEnergy Advisors’ certificate and use of the FirstEnergy name until such time as the

Commission has remedied FirstEnergy Advisors' noncompliance with Ohio's electric utility corporate separation law.

Respectfully submitted,



---

Glenn S. Krassen (Reg. No. 0007610)  
BRICKER & ECKLER LLP  
1001 Lakeside Avenue, Suite 1350  
Cleveland, OH 44114  
Telephone: (216) 523-5405  
Facsimile: (216) 523-7071  
E-mail: gkrassen@bricker.com

Dane Stinson (0019101)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
Telephone: (614) 227-4854  
Facsimile: (614) 227-2390  
Email: dstinson@bricker.com

Attorneys for Northeast Ohio Public Energy  
Council

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Northeast Ohio Public Energy Council's Application for Rehearing* was served upon the parties of record this 22<sup>nd</sup> day of May 2020, electronic transmission.



---

Dane Stinson

[lrader@firstenergycorp.com](mailto:lrader@firstenergycorp.com)  
[talexander@calfee.com](mailto:talexander@calfee.com)  
[khehmeyer@calfee.com](mailto:khehmeyer@calfee.com)  
[john.jones@ohioattorneygeneral.gov](mailto:john.jones@ohioattorneygeneral.gov)  
[trhayslaw@gmail.com](mailto:trhayslaw@gmail.com)  
[mwager@taftlaw.com](mailto:mwager@taftlaw.com)  
[iavalon@taftlaw.com](mailto:iavalon@taftlaw.com)  
[mksettineri@vorys.com](mailto:mksettineri@vorys.com)  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)  
[schmidt@sppgrp.com](mailto:schmidt@sppgrp.com)  
[angela.obrien@occ.ohio.gov](mailto:angela.obrien@occ.ohio.gov)  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)

Attorney Examiner:

[Megan.addison@puco.ohio.gov](mailto:Megan.addison@puco.ohio.gov)



**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**5/22/2020 4:03:54 PM**

**in**

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

Summary: Text Northeast Ohio Public Energy Council's Application for Rehearing electronically filed by Teresa Orahod on behalf of Glenn S. Krassen