BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Admin. Code Chapter 4902:1-37.	)))))	Case No. 17-974-EL-UNC

SUPPLEMENTAL COMMENTS
OF
NORTHEAST OHIO PUBLIC ENERGY COUNCIL

I. SUMMARY

The Northeast Ohio Public Energy Council ("NOPEC") objects to the Commission determining in this proceeding what should have been determined in FirstEnergy Advisors' certification case:[1] whether FirstEnergy Advisors is "fit" to provide brokerage and aggregation services.[2] At issue in this proceeding, as in the *Certification Case*, is whether FirstEnergy's management structure and use of the "FirstEnergy" name comply with the Commission's corporate separation rules. They do not. The Commission granted FirstEnergy Advisors a certificate without formally resolving these material questions. FirstEnergy Advisors never should have been certified to provide competitive retail electric service ("CRES") under these circumstances.[3] NOPEC renews its request, made in its application for rehearing of the *Certification Case*, that FirstEnergy Advisors' certificate be suspended pending resolution of these issues.[4]

[1] Suvon, LLC filed a certification application seeking to do business as FirstEnergy Advisors; see, Case No. 20-103-EL-AGG (the "*Certification Case*").

[2] R.C. 4928.08(B) and 4901:1-24-10(C).

[3] The Commission approved FirstEnergy Advisors' application in the *Certification Case* on April 22, 2020.

[4] See *Certification Case*, NOPEC Application for Rehearing (May 22, 2020) at 5, 21.

NOPEC also objects to using this proceeding to resolve corporate separation issues with respect to FirstEnergy Advisors. The focus of this proceeding was the FirstEnergy Ohio electric distribution utilities'[5] relationship with FES. FirstEnergy Advisors' didn't exist at the time this case was opened or when the independent auditor performed its investigation.[6] Thus, FirstEnergy Advisor's relationship with the EDUs has not been scrutinized by an independent auditor. For this reason, it is patently unfair to address this relationship without a supplemental report from the independent auditor and a hearing, which NOPEC urges the Commission to initiate. To the extent that NOPEC can analogize the independent auditor's findings regarding the EDUs' relationship with FES to the EDUs' relationship with FirstEnergy Advisors, NOPEC submits that:

(1) The "FirstEnergy" name must be removed immediately from "FirstEnergy Advisors" to eliminate affiliate bias;[7] and

(2) FirstEnergy Advisors' senior officers, directors or managers must be separate and distinct from those of the regulated FirstEnergy Ohio EDUs.[8]

II. BACKGROUND

NOPEC (along with a diverse group of commenters[9]) filed initial and reply comments in this proceeding on December 31, 2018 and January 7, 2019, respectively. The Audit Report, comments and replies primarily addressed the EDUs' relationship with their only affiliated CRES provider, FES. Since that time, FES filed for bankruptcy, was divested by FEC and now

[5] Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company are the Ohio monopoly electric distribution utilities ("EDUs") whose parent is FirstEnergy Corp ("FEC"). FEC also is the parent of FirstEnergy Advisors, and the former parent of FirstEnergy Solutions ("FES"), each a CRES provider in Ohio. FirstEnergy Advisors and the EDUs are affiliate entities. FirstEnergy Service Company provides services to all of the affiliates and FEC.

[6] See 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").

[7] *Id*. at 98-99.

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

[9] Commenters included NOPEC, the Office of the Ohio Consumers' Counsel ("OCC"), Interstate Gas Supply, Inc., and Retail Energy Supply Association.

is defunct. It emerged from bankruptcy on February 27, 2020, as Energy Harbor LLC, which is not technically affiliated with the EDUs.[10]

FirstEnergy Advisors filed its application to provide brokerage and aggregation services as a CRES provider in Ohio on January 17, 2020, just prior to FES's (n/k/a Energy Harbor) emergence from bankruptcy. Therefore, its relationship with the EDUs was not examined in the May 14, 2018 Audit Report, and many of the independent auditor's findings with respect to FES have become superseded by the same issues presenting themselves with the emergence of the EDUs' new competitive retail electric service affiliate, FirstEnergy Advisors.

NOPEC and numerous other parties challenged FirstEnergy Advisors' managerial capability to provide service in the *Certification Case* under R.C. 4928.08(B) and 4901:1-24-10(C). The challenge was based on some of the analogous findings the independent auditor made in this proceeding concerning how the EDUs' relationship with FES violated Ohio's corporate separation rules. PUCO Staff recognized the intervening parties' concerns and suspended FirstEnergy Advisors' application on February 11, 2020.

FirstEnergy Advisors supplemented its application (apparently at Staff's request[11]) on April 1, 2020. On April 22, 2020, the Commission issued its finding and order in the *Certification Case*, denying intervenors' motions to compel discovery and requests for hearing. It approved FirstEnergy Advisors' application based upon a ministerial review that FirstEnergy Advisors had completed all portions of the certification application form, and ordered that the issues raised regarding corporate separation violations be addressed in this proceeding.[12]

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[10] See Case No. 00-1742-EL-CRS, Finding and Order (May 6, 2020).

[11]NOPEC filed a public records request to obtain various Commission records containing communications about the Certification Case. The request reveals communications between Staff and FirstEnergy Advisors prior to filing the supplement to the application. Substantial portions of other communications have been redacted. Not all of the public records requested by NOPEC have been provided as of the date of these Comments.

[12] *Certification Case*, Order (April 22, 2020) at 5.

NOPEC, OCC and RESA filed applications for rehearing of the Commission's finding and order on May 22, 2020. The Commission's decision on rehearing is pending.

By entry in the instant case, the attorney examiner *sua sponte* took administrative notice of FirstEnergy Advisors' application and supplement filed April 1, 2020.[13] Because the independent auditor could not review the EDUs' relationship to FirstEnergy Advisors, the application and self-serving supplement are the only additional information added to the record upon which the intervening parties may comment on the EDUs' relationship with FirstEnergy Advisors. In effect, the Commission is permitting FirstEnergy Advisors to audit itself. This process lacks fundamental fairness. No reason exists to transfer information to this proceeding that could, and should, have been ruled on in the *Certification Case*, after hearing with sufficient time for discovery.

III. SUPPLEMENTAL COMMENTS

A. The "FirstEnergy" name must be removed immediately from "FirstEnergy Advisors" to eliminate affiliate bias.[14]

In its initial and reply comments in this proceeding, NOPEC agreed with the independent auditor that the "FirstEnergy" name must be removed from the name "FirstEnergy Solutions." Audit Report at 46, 98-99. The auditor's rationale applies equally to FirstEnergy Advisors, and any other CRES provider affiliated with the EDUs.

NOPEC notes that the Audit Report concluded that an EDU-affiliated CRES provider's use of the "FirstEnergy" name violates the EDUs' Code of Conduct in their corporate separation plan. The Code of Conduct provision cited is a reiteration of O.A.C. 4901:1-37-04(D)(7), which provides:

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[13]Entry (April 29, 2020) at 3.

[14] *Id*. at 98-99.

> (7) The electric distribution utility, upon request from a customer, will provide a complete list of all competitive retail electric service providers operating on the system, but ***may not endorse any competitive retail electric service providers, indicate that an electric services company is an affiliate*** unless specifically and independently asked by a customer or other third party, or indicate that any competitive retail electric service provider will receive preference because of an affiliate relationship. [Emphasis supplied.]

The Audit Report concludes that, by virtue of using the "FirstEnergy" name, it is impossible for the EDUs' representatives ***not*** to "indicate" that FES was an affiliate, because they shared a common name. Audit Report, at 98. Indeed, by virtue of their widespread branding program the Operating Companies effectively are "endorsing" FES over other CRES suppliers. *Id.*

In the supplement to its application, FirstEnergy Advisors asserts that it will use the following "disclaimer" in its marketing and advertising materials, apparently to remedy this violation. The Commission even placed its imprimatur on the disclaimer's use. *Certification Case* at 6. The disclaimer reads:

> 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.

FirstEnergy Advisors (and the Commission) completely miss the point. The independent auditor found that mere use of the FirstEnergy name violated O.A.C. 4901:1-37-04(D)(7) because it would ***indicate*** that the CRES provider is an affiliate. Use of the above disclaimer would be an even more egregious violation of the rule, because it prominently proclaims that FirstEnergy

Advisors is an EDU affiliate. The disclaimer does not resolve the corporate separation rules violation, but instead exacerbates it. Indeed, 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.

The Commission should require FirstEnergy Advisors immediately to cease using the FirstEnergy name.

B. FirstEnergy Advisors' senior officers, directors or managers must be separate and distinct from those of the regulated FirstEnergy Ohio EDUs.[15]

The auditor found that it was improper to comingle executive management from FES's competitive sales division as part of the senior leadership team of FirstEnergy 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.[16] It recommended that the officer be removed from the Service Company and returned to FES.[17]

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

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

[16] *Id*. at 39.

[17] *Id*. at 36.

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.

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.

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

COMMON MANAGERS/DIRECTORS/EXECUTIVE OFFICERS		
FirstEnergy Corp/FirstEnergy Service Company[18]	FirstEnergy Advisors[19]	Regulated Utilities[20]
Charles Jones, CEO FEC/FESC	Charles Jones, Manager	Charles Jones Director
D.M. Chack, Sr. VP Mkting/Branding FESC	D.M. Chack, Manager	
S.E. Strah, President 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***.

FirstEnergy Advisors' supplement filed April 1, 2020, does absolutely nothing to alter the conclusion that its senior officers, directors or managers must be separate and distinct from those of the regulated FirstEnergy Ohio EDUs.[21] The supplement offers nothing but broad conclusions and illusory promises. It intimates that senior executives may be shared between regulated and nonregulated affiliates; but, cannot explain how the same senior individuals who run the EDUs and FirstEnergy Advisors can separate their knowledge of the EDUs' business plans and market information from their knowledge of FirstEnergy Advisors' business plans and operations.

Indeed, in their initial comments in this proceeding, the EDUs attempted to justify FES's leaders' inclusion in FirstEnergy Service Company, claiming that they did not have joint business meetings or communications with EDU employees.[22] FirstEnergy Advisors' senior

[18] See https://www.firstenergycorp.com/investor/corporate_governance/officers_and_directors.html

[19] See Suvon Initial Certification Application, Case No. 20-103-EL-CRS, Exhibit A-12 (January 17, 2020).

[20] See Companies' Annual Reports, 2018 4Q FERC Form 1.

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

[22] EDUs' Initial Comments at 7-8.

management team members necessarily "meet" with EDU and Service Company leaders, because each of FirstEnergy Advisors' managers holds position with the other affiliates.

Further, apart from sharing senior officers through FirstEnergy Service Company, the independent auditor also was concerned that there was not sufficient physical separation between regulated and nonregulated employees.[23] Physical separation is even more of a concern with respect to FirstEnergy Advisors. Unlike FES, the entire affiliate operations will be located together with the EDUs' operations in the EDUs' headquarters at 76 South Main Street in Akron. While it's impossible to separate regulated and nonregulated information possessed by each of FirstEnergy Advisors managers (as explained above), the same location of EDU and FirstEnergy Advisors' employees presents the real practical opportunity for a rampant exchange of nonpublic information. Especially disturbing is the opportunity for the EDUs' employees to provide business leads to FirstEnergy Advisors, to the detriment of its competitors, the Ohio competitive retail electric market and the customers they serve. Simply put, there has been no public and transparent, and certainly not a sufficient, investigation undertaken by the Commission to assure compliance with applicable corporate separation rules.

IV. CONCLUSION

NOPEC objects to the Commission's failure to address in the Certification Case the issues it has set for comment in this proceeding. NOPEC respectfully requests that the Commission order FirstEnergy Advisors immediately to cease using the "FirstEnergy" name. In addition, NOPEC requests that the Commission also should order FirstEnergy Advisors' senior officers, directors or managers to be separate and distinct from those of the regulated FirstEnergy Ohio EDUs. Finally, NOPEC requests that the Commission order the independent auditor to

[23] Audit Report at 36.

perform a supplemental investigation of the EDUs' relationship with FirstEnergy Advisors and conduct a public hearing with discovery rights on the auditor's conclusions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Supplemental Comments* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 29th day of May, 2020.

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Summary: Text Supplemental Comments of Northeast Ohio Public Energy Council electronically filed by Teresa Orahood on behalf of Glenn S. Krassen