

**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 THE RETAIL ENERGY SUPPLY ASSOCIATION

In accordance with the Commission Entry of April 29, 2020, the Retail Energy Supply Association (RESA)¹ offers the following supplemental comments to the Final Report of SAGE Management Consultants, LLC filed on May 14, 2018 (Sage Report). The comments that follow are in addition to, and not in lieu of, the comments filed on December 31, 2018 and January 7, 2019.

I. INTRODUCTION

Two significant events have occurred since the last round of comments. In September 2019, a new FirstEnergy affiliate, Suvon, LLC d/b/a FirstEnergy Advisors (Suvon) began offering cable and internet, home repair services and home security systems to customers and, more recently, obtained a certificate to expand its services to governmental aggregation and

¹ The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

power brokering.² Additionally, in early 2020, FirstEnergy Solutions Corp. (FES) converted from an Ohio corporation to a Delaware LLC and changed its name to “Energy Harbor.”³

Neither of these events alleviates the need to address the auditor’s findings—especially since this audit proceeding and RESA’s complaint in Case No. 18-736-EL-CSS have been consolidated. RESA’s complaint about the Smart Mart sales channel alleges that the FirstEnergy EDUs (as opposed to any affiliate) were offering the “nonelectric products and services” that Suvon began offering *after* RESA filed its complaint.⁴ Whether Suvon may offer these products and services today does not resolve whether the EDUs offered them illegally during the audit period.

FES now does business under a new name, but co-branding and co-marketing under the “FirstEnergy” name is still at issue. The Sage Report found that FES’s former success in the CRES market “may be related to its FirstEnergy name” and the implied endorsement by the FirstEnergy EDUs. Suvon’s use of the “FirstEnergy Advisors” d/b/a presents the very same affiliate bias. Suvon should not be permitted to use the FirstEnergy name for the same reason the auditors recommended that FES not be permitted to use it. “[I]t is impossible” to not make a connection between the FirstEnergy EDUs and FirstEnergy Advisors.⁵

If these recent events make anything clear, it is that FirstEnergy’s corporate separation plan is badly out of date. Commission rules recognize the need to update a corporate separation

² *Application of Suvon, LLC*, Case No. 20-103-EL-AGG, Application Exhibit A-13 and Finding and Order (Apr. 22, 2020).

³ *Application of FirstEnergy Solutions Corp.*, Case No. 00-1742-EL-CRS, Notice of Material Change (Feb. 27, 2020).

⁴ *Retail Energy Supply Association v. Ohio Edison Co., et al.*, Case No. 18-736-EL-CSS, Complaint (April 25, 2018).

⁵ Sage Report at 97-98.

plan as circumstances change.⁶ The Commission should order the FirstEnergy EDUs to file an amended plan disclosing *all* current affiliates and *all* goods and services provided by each.

Meaningful enforcement of corporate separation is impossible without this basic information.

II. COMMENTS

RESA's complaint in Case No. 17-974-EL-UNC alleges that the FirstEnergy EDUs are providing various "nonelectric product[s] or service[s]," which violates R.C. 4928.17(A)(1) because such products and services may only be provided by "a fully separated affiliate of the utility." The FirstEnergy EDUs admitted that they provide these products and services, but that they are permitted to do so under the "Special Customer Services" provision of their tariffs.⁷ As noted by the auditors, these products and services include "smart thermostats and smart light bulbs (with cameras, speakers, or Wi-Fi boosters)" as well as "appliance warranties and electrician referrals."⁸

It is unclear whether the FirstEnergy EDUs continue to offer the Smart Mart product and services, or whether this business has been taken over by Suvon. Suvon's application in Case No. 20-103-EL-AGG suggests the latter. According to the application, "[i]n September of 2019, Suvon, LLC DBA FirstEnergy Home expanded its offerings to include home connections for cable and Internet, home repair services and home security systems, and began offering these products and services to customers in Ohio, Pennsylvania, New Jersey, Maryland and West Virginia."⁹

⁶ O.A.C. 4901:1-37-06(A) ("All proposed revisions and/or amendments to the electric utility's approved corporate separation plan shall be filed with the commission, and a copy of the filing shall be provided simultaneously to the director of the utilities department (or their designee).").

⁷ *Retail Energy Supply Association v. Ohio Edison Co., et al.*, Case No. 18-736-EL-CSS, Answer ¶¶ 13-16, 18-19, 28, 37, 41 (April 25, 2018).

⁸ Sage Report at 94.

⁹ *Application of Suvon, LLC*, Case No. 20-103-EL-AGG, Application, Exhibit A-13

Transferring responsibility for the Smart Mart program from the FirstEnergy EDUs to Suvon does not resolve the issues raised in RESA’s complaint or in this proceeding. Suvon’s use of the FirstEnergy name confers an unfair advantage, and there is still reason to question whether Suvon functions as a separate and independent affiliate. These concerns are addressed more fully below.

A. The Auditor’s findings and recommendations concerning joint use of the FirstEnergy name also apply to Suvon.

The auditors found that “FirstEnergy Solutions’ successful competitive retail electric services in the Ohio Companies’ territories may be related to its FirstEnergy name.”¹⁰ The auditors also determined that “[t]he link to the FES website from the FirstEnergy website provides an unfair advantage.”¹¹ The auditors recommend “[r]emov[ing] FirstEnergy from the name of FirstEnergy Solutions to eliminate affiliate bias” and “[r]emov[ing] the links between the FirstEnergy website and the FES website.”¹²

In February 2020, FES filed a notice of material change in its certification docket to indicate a name change to Energy Harbor, LLC.¹³ According to Energy Harbor, it is no longer affiliated with FirstEnergy Corp.¹⁴ This does not prevent the Commission from investigating and sanctioning conduct that occurred when FES *was* an affiliate. More importantly, the unfair advantage the FES used to enjoy is now enjoyed by Suvon. Suvon should not be permitted to

¹⁰ Sage Report at 97.

¹¹ *Id.* at 98.

¹² *Id.* at 98-99.

¹³ *Application of Energy Harbor LLC*, Case No. 00-1742-EL-CRS, Notice of Material Change (Feb. 27, 2020).

¹⁴ *Id.* (“Energy Harbor Corp. is no longer a FirstEnergy Corp. affiliate. FirstEnergy Corp. and Energy Harbor Corp. are separate businesses operating independently from each other, and Energy Harbor Corp.’s financial performance does not impact FirstEnergy Corp. or its subsidiaries such as the Companies.”).

hold itself out as “FirstEnergy Advisors” for the same reasons the auditor recommended that FES drop “FirstEnergy” from its name.

All entities affiliated with FirstEnergy are subject to the EDUs’ corporate separation plan. The plan must ensure that “the *utility will not extend* any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service;” that “*any such affiliate, division, or part will not receive* undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service;” and that “[*n*]o such utility, affiliate, division, or part shall extend such undue preference.”¹⁵ So regardless of who owns the FirstEnergy name and mark, Suvon cannot operate under the “FirstEnergy” name if doing so would give it an “undue preference or advantage.”

Each of the FirstEnergy EDUs identify and market themselves under a common logo as “A FirstEnergy Company.” Suvon wants the consuming public to know that it, too, is “a FirstEnergy company.” Whether Suvon intends for customers to believe that FirstEnergy Advisors works on behalf of, or is an agent of, the FirstEnergy EDUs is irrelevant. Compliance with the rules are measured by what the common use of the FirstEnergy name “will lead customers to believe.”¹⁶ As the auditor noted, “it is impossible” for consumers to not make the connection between entities using a common name.¹⁷

Moreover, the FirstEnergy EDUs’ corporate separation plan does *not* permit joint advertising among the EDUs and unregulated affiliates. The plan describes the FirstEnergy EDU’s intention to market *their* affiliation *with their parent company* under the “FirstEnergy”

¹⁵ R.C. 4928.17(A)(3) (emphasis added).

¹⁶ See O.A.C. 4901:1-21-05(C)(8)(h).

¹⁷ Sage Report at 98.

trademark.¹⁸ The plan does not authorize the EDUs' *affiliates* (such as Suvon) to also use the FirstEnergy name or mark to promote competitive products. The Commission can, and should, direct Suvon to cease using the "FirstEnergy" name.

B. Like FES, Suvon does not function as a "fully separate" affiliate.

Many executives and employees who worked for FES were employed by FirstEnergy Service Company. As noted in the Sage Report, "some Service Company employees designated as 'Shared Services' were not completely familiar with their FERC designation and did not understand well the restrictions that come with the designation."¹⁹ The shared services designation is "overused."²⁰ "Attendance by the FES CRES retail sales executive at meetings with other Service Company executives focused on regulated utility operations is problematic. It makes separation of regulated and competitive information highly challenging."²¹ The auditors characterize this structure as "highly inappropriate."²²

Suvon is managed under the same "highly inappropriate" structure. Like FES, most of Suvon's principal officers and directors are employed by the Service Company. The Commission cannot determine whether Suvon operates as a "*fully separated affiliate*"²³ without knowing what other lines of business and activities these shared services employees are responsible for. If these employees are also responsible for EDU activities, then Suvon is not *functionally* independent, regardless of its separate corporate status.

¹⁸ *Application of Ohio Edison Co., at al.*, Case No. 09-462-EL-UNC, Corporate Separation Plan (June 1, 2009) (Corp. Sep. Plan) at 6.

¹⁹ Sage Report at 36.

²⁰ *Id.* at 35.

²¹ *Id.* at 34.

²² *Id.*

²³ R.C. 4928.17(A)(1)(emphasis added).

As already covered in Suvon’s certification proceeding, Suvon is housed in the same general office building as the FirstEnergy EDUs. This is notwithstanding the provision in the approved corporate separation plan stating that “utility services employees and competitive services employees are physically separated where practical [.]”²⁴ If it is not practical to locate Suvon’s operations in a separate facility, Suvon has the burden of explaining why.

When separate subsidiaries engaged in both regulated and unregulated businesses share common management and facilities, a rigorous corporate separation plan takes on heightened importance. There is no reason to believe that FirstEnergy has reformed the “highly inappropriate” management structure noted by the auditors.

C. The EDUs should be ordered to file an updated corporate separation plan.

R.C. 4928.17(D) accommodates amendments to corporate separation plans “pursuant to a request from any party” to “reflect changed circumstances.”²⁵ The Ohio Companies filed their corporate separation plan in Case No. 09-462-EL-UNC, and the Commission approved it by adopting the stipulation in Case No. 10-388-EL-SSO. The plan is outdated. The Commission should order the FirstEnergy EDUs to update it.

A corporate separation plan must include “[a] list of all current affiliates identifying each affiliate's product(s) and/or service(s) that it provides.”²⁶ Attachment 1 to FirstEnergy’s plan is a list of affiliates and their respective products and services.²⁷ Suffice it to say, circumstances have changed over the last ten years. FES is now Energy Harbor, and purportedly is no longer an

²⁴ Corp. Sep. Plan at 3.

²⁵ R.C. 4928.17(D).

²⁶ R.C. 4928.17(A)(1)(emphasis added).

²⁷ Corp. Sep. Plan at 28-30

affiliate. Suvon *is* an affiliate, but it is not listed as such, nor its product and service offerings disclosed.

R.C. 4928.17(A) does not allow affiliates to provide “a competitive retail electric service” or “a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan[.]” Suvon cannot “operate[] under” a corporate separation plan it is not even listed in. Moreover, Suvon’s service offerings vastly exceed the “Consumer Products” goods and services disclosed in FirstEnergy’s corporate separation plan, which states in its entirety:

The Companies offer a limited number of products and services other than retail electric service pursuant to existing tariff provisions and plan to continue offering the same types of products and services in the same manner. Upon customer request, the Companies may use contractors to provide other utility-related services, programs, maintenance and repairs related to customer-owned property, equipment and facilities. In addition, the Companies plan to provide products and services other than retail electric service in an effort to comply with energy efficiency and peak demand reduction benchmarks set out in R.C. Section 4928.66. These programs give the Companies the opportunity to more completely serve customers and assist in meeting statutory requirements.²⁸

Suvon *cannot* lawfully market or sell its products or services until the FirstEnergy EDUs update their plan.

The Commission’s rules expressly contemplate periodic updates to corporate separation plans.²⁹ Keeping the list of affiliates and services up to date is not a big ask. The rules provide for automatic approval of changes if not acted on within 60 days.³⁰ An amendment to the

²⁸ *Id.* at 6.

²⁹ O.A.C. 4901:1-37-06(A)(“All proposed revisions and/or amendments to the electric utility's approved corporate separation plan shall be filed with the commission, and a copy of the filing shall be provided simultaneously to the director of the utilities department (or their designee).”)

³⁰ O.A.C. 4901:1-37-06(B).

corporate separation plan should have been filed *before* the FirstEnergy EDUs or Suvon ventured into the home services market.

The Commission cannot enforce corporate separation without knowing which affiliates provide what services. FirstEnergy should be ordered to update its list of affiliates and services.

III. CONCLUSION

The FES name change and approval of Suvon's CRES certificate do not moot any of the issues identified in the Sage Report. The same issues exist with new affiliations and service offerings. The Commission should order Suvon to drop the "FirstEnergy Advisors" d/b/a, schedule a hearing to consider evidence of whether Suvon is a fully separated affiliate, and order the FirstEnergy EDUs to file an updated corporate separation plan.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Comments of The Retail Energy Supply Association was served by electronic mail on this 29th day of May, 2020 to the following:

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