BEFORE
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. 20-0103-EL-AGG

SUVON, LLC D/B/A FIRSTENERGY ADVISORS' MEMORANDUM IN OPPOSITION TO THE APPLICATIONS FOR REHEARING FILED BY NORTHEAST OHIO PUBLIC ENERGY COUNCIL, THE OHIO CONSUMERS' COUNSEL, AND RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

Suvon, LLC d/b/a FirstEnergy Advisors ("FirstEnergy Advisors") opposes the Applications for Rehearing of the Commission's April 22, 2020 Finding and Order filed by Northeast Ohio Public Energy Council ("NOPEC"), the Ohio Consumers' Counsel ("OCC"), and Retail Energy Supply Association ("RESA") (collectively "Intervenors"). The Applications for Rehearing add nothing new; they simply regurgitate the arguments the Intervenors raised throughout the multiple filings in this case. Because Intervenors fail to present any arguments that the Commission has not already considered, addressed, and properly rejected, the Applications for Rehearing must be denied.

II. ARGUMENT

A. The Commission has already considered and properly rejected all arguments the Intervenors raise.

The parties repeat the arguments which they previously made regarding Ohio's corporate separation rules and the Sage Audit Report.[1] As these have already been considered and rejected

[1] NOPEC Application for Rehearing at 6–8, 14–15 ("NOPEC"); OCC Application for Rehearing at 2–4 ("OCC").

by the Commission, there is no need to consider them further here.[2] *See, e.g., In the Matter of the Complaint of Mr. and Mrs. Ronald E. Kohli v. The Dayton Power and Light Company,* Case No. 82-1204-EL-CSS, Entry on Rehearing (July 17, 1984) (denying application for rehearing because complainants "failed to raise any matters which [the Commission] did not take into consideration" previously).

B. The Commission properly reserved corporate separation questions generally to its own docket.

In application proceedings, the Commission will approve an application if it finds that the applicant is managerially, financially, and technically fit and capable of performing the service it intends to provide; managerially, financially, and technically fit and capable of complying with all applicable commission rules and orders; and the applicant is able to provide reasonable financial assurances sufficient to protect electric distribution utility companies and the customers from default.[3] The Commission's Staff investigated these factors. The Commission found that "Staff has thoroughly reviewed Suvon's managerial, technical and financial capability and has recommended that Suvon's application should be approved."[4]

No Intervenor identified any one of the factors above which FirstEnergy Advisors does not meet. Instead, they chose to argue only corporate separation issues. "[W]e find that no other parties have raised material issues regarding Suvon's managerial, technical and financial capability."[5] NOPEC's choice on this was specifically noted. "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

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[2] Finding and Order (Apr. 22, 2020) at ¶ 20 ("Order").
[3] Ohio Admin. Code 4901:1-24-10(C)(1)–(3).
[4] Order at ¶ 21.
[5] *Id.*

with the corporate separation requirements rather than Suvon's managerial, technical and financial capability."[6] As no party raised any questions with FirstEnergy Advisors' compliance under the applicable legal standard, the Commission acted appropriately.

The Commission also specifically rejected Intervenors' claims here that there is no difference between corporate separation and the factors for obtaining a license. "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."[7]

While the Intervenors would like to discuss corporate separation in this case, the Commission is not required to address that issue here. The Commission has discretion to consider corporate separation issues in its own docket.[8] Indeed, the parties seeking rehearing have already participated in the corporate separation case and, as the Commission made clear, it has not adopted the audit report at this time, and "the finding and conclusions of the auditor should be litigated in that proceeding rather than this case."[9]

Intervenors also argue that the Commission erred in deciding to handle those issues in another docket. Intervenors claim that the Commission should have required FirstEnergy Advisors to show that it will never violate Ohio law in the future by violating the corporate separation rules.[10]

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[6] *Id*.
[7] Order at ¶ 21.
[8] *See, e.g., Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982) ("the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort").
[9] Order at ¶ 20.
[10] *See* NOPEC at 8–9; OCC at 5, 10–12; RESA Application for Rehearing at 4–6 ("RESA").

Intervenors are essentially demanding that FirstEnergy Advisors prove a negative—that no possible violation of Ohio law could ever happen. But this is simply not the rule.

As discussed above, Ohio law requires the applicant to establish that it is capable of compliance with Commission rules and orders. It does not require the applicant to show that no violation is possible in the future. For example, Ohio law prohibits CRES providers from slamming customers, but applicants are not required to prove at the time of application that they could never possibly perform such an act in the future. Instead, they—like FirstEnergy Advisors—are asked to comply with all aspects of Ohio law and are subject to penalty if they violate those rules. As the Commission has previously stated, "[t]he mere possibility that something could happen is not a violation of the Commission's rules."[11]

C. The Commission made all the required factual findings to grant FirstEnergy Advisors' Application.

NOPEC claims that the Commission failed to make all required findings of fact to support its approval of FirstEnergy Advisors' Application.[12] NOPEC is incorrect because, as discussed above, the Commission specifically referenced the Application and supplements, the facts referenced therein, and Staff's investigation of the facts upon which it relied. The Commission also relied on the fact that despite numerous intervenors participating in this proceeding none identified any valid issues. "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

[11] In the Matter of the Complaint of the Ohio Consumers Counsel, Stand Energy Corp., Inc., Ne. Ohio Pub. Energy Council, & Ohio Farm Bureau Fed'n, Complainants, No. 10-2395-GA-CSS, 2012 WL 3613674 (F.E.D.A.P.J.P. Aug. 15, 2012) at 17.
[12] NOPEC at 11–13.

aggregator in this state."[13] As the Commission specifically indicated that it relied on FirstEnergy Advisors' Application and the Staff's investigation into the same, it has made all the factual findings required.[14]

OCC and NOPEC also take issue with the lack of a hearing in this case.[15] There is no automatic right to a hearing in Commission cases. As Intervenors are well aware, Commission cases often proceed without a hearing, even when parties disagree. For example, rulemaking proceedings are significant and/or contentious yet proceed without hearings or discovery on a regular basis. Intervenors do not acknowledge this well-established Commission practice. Intervenors instead claim that simply because they oppose FirstEnergy Advisors' Application, they are somehow entitled to a hearing.[16] Notably, Intervenors cite no authority in support of this novel argument. As Intervenors have not identified any authority in support of this position, it should be rejected.

Additionally, the Commission's decision does not violate R.C. 4903.09, as OCC argued.[17] In its Order, the Commission clearly explained the evidence it relied on (FirstEnergy Advisors' Application and supplements), the Staff reviewed this evidence and investigated FirstEnergy Advisors' Application, and the Commission reviewed and ruled. There is no requirement that the Commission conduct a hearing or allow intervenor participation before doing so. Indeed, standard Commission practice under the rules anticipates approval within 30 days without any Commission action.[18] Therefore, there are no required factual findings the Commission must make.

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[13] Order at ¶ 22.
[14] *See* Order at ¶¶ 21–22.
[15] OCC at 9-10, NOPEC at 4-5, 14.
[16] OCC at 9–10.
[17] OCC at 9–10.
[18] Ohio Admin. Code 4901:1-24-10(A).

Finally, NOPEC argues the Commission erred by shifting the burden of proof to intervenors.[19] This is not accurate. As discussed above, the Commission extensively discussed the application FirstEnergy Advisors filed and the Staff investigation into that application. Those are the facts on which the Commission relied. If the Intervenors cannot identify any relevant factual dispute, and the Commission notes that fact, it does not shift the burden of proof. It instead is similar to a court recognizing a non-movant for summary judgment failed to establish a genuine dispute of material fact. Both are simple recognitions of the issues in dispute rather than shifting the burden of proof.

D. There is no prohibition on the use of a parent's name.

Intervenors further rely on the Audit Report to rehash their arguments against use of the "FirstEnergy" name.[20] The auditor's findings, however, are inconsistent with Ohio's long history of approving an affiliate's use of the same name as its corporate parent. Indeed, as recognized by the Commission in its Order[21] and previously argued by FirstEnergy Advisors, other Ohio utilities had or have affiliates with similar trade names, including AEP Energy Inc.,[22] Duke Energy Retail Sales,[23] Dominion Retail Inc.,[24] and Vectren Retail, LLC.[25] What is more, to restrict the use of a trade name would be a constitutional violation, as trade names have long been recognized as constitutionally protected commercial speech because they serve to identify a business entity and convey important information about its type, price, and quality of service.[26]

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[19] NOPEC at 14.
[20] NOPEC at 7–8, 19–20; OCC at 4.
[21] Order at ¶ 19.
[22] Case No. 10-0384-EL-CRS; Case No. 12-1491-GA-CRS.
[23] Case No. 04-1323-EL-CRS.
[24] Case No. 00-1781-EL-CRS; Case No. 02-1757-GA-CRS.
[25] Case No. 11-1078-EL-CRS.
[26] *See Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir.1981) (finding that a trade name is a valuable asset which conveys information to customers and, as such, even an obviously racist trade name may not be prohibited by a municipality in light of Plaintiff's First Amendment rights to the trade name).

The Commission extensively considered these issues in its Order.[27] The Commission agreed that "these are not new or novel questions" and discussed Ohio's extensive history with this issue before deciding to treat FirstEnergy Advisors similarly with every other prior applicant in Ohio.[28] As Intervenors have identified no new arguments on this point, their position should be rejected.

E. There is no prohibition on the use of shared service employees.

NOPEC and OCC again take issue with FirstEnergy Advisors' use of shared service employees.[29] Shared service employees are often used in Ohio and there is no prohibition in Ohio law against using shared service employees. The Commission rejected Intervenors' position and pointed out the complete lack of authority supporting Intervenors. "[W]e 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."[30]

Indeed, Ohio has extensive experience in working with shared service employees who properly allocate their time among different entities. Ohio has adopted OAC 4901:1-37-04(A)(5) and 4901:1-37-08, which specifically address how shared service employees should be accounted for under a cost allocation manual. Ohio law expressly permits the use of shared service employees. NOPEC and OCC have cited nothing new in support of their position and this argument should be rejected.

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[27] Order at ¶ 19.
[28] *Id*.
[29] NOPEC at 7, 14–15; OCC at 4–5.
[30] Order at ¶ 21.

Additionally, OCC fails to comprehend the difference among employee classifications.[31] It is certainly possible for employees responsible for one aspect of business, such as accounting, to know information and not disclose it to marketing function employees. This is commonplace, and OCC has cited nothing indicating that this practice is improper.

F. FirstEnergy Advisors is a fully separated affiliate.

NOPEC claims that no affiliate can be separated so long as shared service employees are in key management positions.[32] This is incorrect. FirstEnergy Advisors has already shown it is a separate corporate entity from the regulated distribution utilities.[33] The use of shared service employees has nothing to do with this corporate structure. FirstEnergy Advisors is legally separated from its regulated affiliates.

Ironically, the same commonality of managers was present when FirstEnergy Solutions ("FES") was the CRES provider for NOPEC. NOPEC never objected to this commonality of managers when it was in a financial arrangement with FES. Based on this, it can only be inferred that NOPEC's objection to this structure therefore appears to be strategic rather than a concern that FirstEnergy Advisors' use of shared service employees is improper under Ohio law.

Once again, something done every day in Ohio and elsewhere throughout the country is not a "per se" violation of anything. It is also noteworthy that despite NOPEC repeating this claim, it once again has failed to provide any authority in support.[34]

G. There is no automatic right to discovery which prevents the Commission from issuing this decision.

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[31] OCC at 4–5.
[32] NOPEC at 17–19.
[33] *See* FirstEnergy Advisors' Application, Exhibit A-15.
[34] *See* NOPEC at 18–19.

Intervenors also object to the inability to conduct discovery and participate in a full hearing after that discovery is complete.[35] Contrary to NOPEC and OCC's claims, Ohio law does not provide for a hearing and full discovery process in application cases. As already examined in detail in previous filings in this case, the Commission addressed this exact issue in at least two cases, both of which establish that discovery is not available as a matter of right at any time in every single Commission case.[36] First, in *In re Matter of the Review of Chapter 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, the Commission addressed comments related to the Commission's procedural rules contained in Chapter 4901-1. OCC requested that the Commission add the definition of "proceeding" to the rules and define it as "any filing, hearing, investigation, inquiry or rulemaking which the Commission is required or permitted to make, hold or rule upon."[37] AEP Ohio and AT&T Ohio argued against OCC's definition, arguing that "contrary to OCC's view, there is no right of participation in every matter brought before the Commission," and that if OCC's definition were adopted, it would have significant consequences, including making every case filed with the Commission a 'proceeding' and thus allowing intervention and discovery in every case."[38] The Commission agreed, and outright rejected OCC's request. In so doing, the Commission also held:

> If OCC's proposal were adopted, any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case. **The Commission does not believe that such rights exist.** In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in

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[35] NOPEC at 13, 15–17; OCC at 6–9.
[36] *See* FirstEnergy Advisors' Motion for Protective Order at 5–6; FirstEnergy Advisors' Reply in Support of its Motion for Protective Order at 2–3.
[37] *In re Matter of the Review of Chapter 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶ 7 (Dec. 6, 2006).
[38] *Id.* at ¶ 8.

> a manner that it deems appropriate and would unduly delay the outcome of many cases. The request is denied.[39]

Likewise, in another matter, the Commission held:

> The Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an evidentiary hearing in this proceeding or to the full discovery process normally reserved for cases where a hearing is required.[40]

These cases make clear that there is no universal right to discovery in every Commission case. Accordingly, the Commission rightfully rejected NOPEC's and OCC's position in its Order.[41] NOPEC and OCC again fail to raise new issues related to this tired argument. Accordingly, the Commission should reject rehearing on this point.

H. OCC raises a new claim in a single sentence that FirstEnergy Advisors has failed to show the required financial assurances.

Finally, OCC raises a new claim—in a single sentence—that FirstEnergy Advisors has "failed to show" it has the required "financial assurances."[42] This is incorrect. As part of its Application, FirstEnergy Advisors provided, among other things, the requisite financial statements,[43] forecasted financial statements,[44] and credit report[45] to the Commission. The Commission found this was sufficient when it approved the Application.[46] Accordingly, OCC's claim should be rejected.

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[39] *Id.* at ¶ 9 (emphasis added).
[40] *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing at ¶ 8 (Oct. 28, 2003).
[41] Order at ¶¶ 23–25.
[42] OCC at 6 ("And it failed to show it has financial assurances sufficient to protect the distribution utility and customers from default as required in Ohio Adm. Code 4901:1-24-10(C) and R.C. 4928.08(B).").
[43] FirstEnergy Advisors' Application, Exhibit C-3.
[44] FirstEnergy Advisors' Application, Exhibit C-5.
[45] FirstEnergy Advisors' Application, Exhibit C-7.
[46] *See* Order at ¶ 22.

III. CONCLUSION

NOPEC, OCC, and RESA fail to show that the April 22, 2020 Order was unreasonable or unlawful. Therefore, for the reasons stated above, the Commission should deny the Applications for Rehearing filed by NOPEC, OCC, and RESA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 1st day of June 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander
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Summary: Memorandum Suvon, LLC d/b/a FirstEnergy Advisors' Memorandum in Opposition to the Applications for Rehearing Filed By Northeast Ohio Public Energy Council, the Ohio Consumers' Counsel, and Retail Energy Supply Association electronically filed by Ms. Kari D Hehmeyer on behalf of Suvon, LLC d/b/a FirstEnergy Advisors