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 REPLY 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 reply comments to the Final Report of SAGE Management Consultants, LLC filed on May 14, 2018 (Sage Report).

I. INTRODUCTION

The Sage Report was completed over two years ago. Comments were filed at the end of 2018 and beginning of 2019. The Commission recently invited supplemental comments "[i]n light of both the emergence of Energy Harbor from bankruptcy and the Commission's ruling in Suvon's certification case [.]"[2] RESA's supplemental comments explain why these events do not alleviate the need to act on the auditor's findings.

The Companies[3] argue otherwise, making three claims: (1) "SAGE's findings and recommendations regarding Energy Harbor are now moot;" (2) "The Companies are in compliance with corporate separation requirements;" and (3) "SAGE's Audit Report does not

[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.
[2] April 29, 2010 Entry ¶ 9.
[3] Ohio Edison Company, Toledo Edison Company, and Cleveland Electric Illuminating Company.

substantiate any of the claims in the RESA Complaint."[4] The Companies are wrong on all counts.

One of the takeaways of the Sage Report is that FirstEnergy overuses the "shared services" designation, resulting in a management structure where the same people are involved in both regulated and competitive business units. There is no evidence that this has changed. All the problems that plagued FirstEnergy Solutions (FES) continue to exist with other affiliates, including Suvon LLC d/b/a FirstEnergy Advisors (Suvon). The auditor's findings on this subject are by no means "moot."

Nor can the Companies make any credible claim they are "in compliance with corporate separation requirements."[5] The auditor revealed that the Companies *do not even have an Ohio corporate separation compliance program*. Four of the auditor's seven general findings in the Executive Summary are specifically directed to shortcomings in the Companies' corporate separation compliance.

RESA's allegations are not only corroborated by the Sage Report, but bolstered by the Companies' admissions in this proceeding. Ohio law strictly forbids the Companies from providing non-electric products or services. Even if the tariff they cite authorizes the sale of "Smart Mart" goods and services (it does not), a tariff cannot trump a statute. The Companies have *admitted* they are violating Ohio law by selling nonelectric products and services.

The Commission should issue an order that (a) adopts the auditor's findings and recommendations; (b) sets a hearing on the allegations raised in RESA's complaint (Case No. 18-736-EL-CSS; (c) directs the Companies and Suvon to cease and desist any further marketing

[4] Companies' Supplemental Comments at 2-3.
[5] *Id*. at 3.

or sale of nonelectric products and services; and (d) directs the Companies to file an amended corporate separation plan and code of conduct.

II. REPLY COMMENTS

The Commission should not let anyone's supplement comments overshadow the auditor's findings. The Executive Summary to the Sage Report conveys seven general findings and recommendations, four which are pertinent here:

- Finding 4: FirstEnergy relies on Federal Energy Regulatory Commission rule compliance for the Ohio Companies' corporate separation requirement compliance; there is no separate Ohio Corporate Separation Rule compliance program.[6]

- Finding 5: The FERC rule compliance program does not cover all of the Ohio Corporate Separation Plan Code of Conduct articles.[7]

  Recommendation: *Develop an Ohio Corporate Separation Rules Compliance Program addendum to the FERC and NERC CIP Compliance Programs.*[8]

- Finding 6: The assignment of FES CRES retail sales and service responsibility to the Service Company and the designation of FES CRES sales and service leaders as Shared Services Employees is highly inappropriate.[9]

  Recommendation*: Transfer all Service Company personnel who support FES CRES sales and customer service in Ohio to FES.*[10]

- Finding 7: The FERC classification designations for Shared Services Employee and Shared Senior Officer are overused.[11]

  Recommendation: *Once the plan for the exit of competitive commodity services is clear, reexamine the FERC classification for all positions*.[12]

These findings should be adopted, and the recommendations ordered.

[6] Sage Report at 19.
[7] *Id*. at 28.
[8] *Id*. at 36.
[9] *Id*. at 34.
[10] *Id*. at 36.
[11] *Id*. at 35.
[12] *Id*. at 37.

A. The Audit findings are not moot.

The Companies say that "[b]ecause FES emerged from bankruptcy as non-affiliate Energy Harbor, SAGE's findings and recommendations related to FES are now moot."[13] No, they are not. The same old problems exist with a new affiliate. If certain affiliate interactions with FES were improper, the same interactions with Suvon are also improper.

1. The Companies and their affiliates must "function independently of each other."

The Companies' comments miss a fundamental point raised not only by RESA and other commenters, but by the auditors themselves: FirstEnergy's subsidiaries do not "function independently of each other," as required by Ohio law.[14] Even if the *Companies* function independently of their affiliates, there is still the problem of the Companies' *affiliates'* lack of independence from other affiliates that provide competitive services.

All entities affiliated with FirstEnergy are subject to corporate separation requirements. A corporate separation 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[.]"[15] In addition, corporate separation requires 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[.]" The statute includes a "catch-

[13] Companies' Supplemental Comments at 2.
[14] *See* O.A.C. 4901:1-37-04(A)(1) and (3).
[15] R.C. 4928.17(A)(1).

all" provision stating that *"[n]o such utility, affiliate, division, or part shall extend such undue preference*."[16]

The Companies are "utilities," so they may not lend money, personnel, equipment, or other assistance to Suvon, the Service Company, or any other affiliate. The Service Company is an "affiliate," so it may not extend preferences or advantages to Suvon, which is also an "affiliate." The Companies and their affiliates must "function independently of each other."

In short, corporation separation requirements are not limited to the *Companies*. The Companies' *affiliates* also have compliance obligations. Compliance by the *Companies* does not demonstrate compliance by their *affiliates*.

2. Suvon does not function independently of FirstEnergy Service Company.

Corporate separation serves dual purposes: (1) to insulate the EDUs from market risk of competitive services; and (2) to prevent EDUs and their affiliates from abusing their market power in competitive markets.[17] These objectives may only be accomplished by requiring utilities and their affiliates to "function independently of each other."[18] The problem at FirstEnergy is that regulated and unregulated affiliates operate interdependently through common management by the Service Company.

"The FirstEnergy Service Company provides shared services to the FirstEnergy Corp. holding company and all of its subsidiaries."[19] The Service Company "is intended to provide shared and common services to all FirstEnergy subsidiaries such as information technology, accounting, security, and the like."[20] These services do not involve the provision of either

[16] R.C. 4928.17(A)(3) (emphasis added).
[17] *See id.*
[18] O.A.C. 4901:1-37-04(A).
[19] Sage Report at 10.
[20] *Id*. at 34.

competitive or non-competitive electric services. They are support services. The Companies do not violate any corporate separation requirements by procuring these services from the Service Company instead of direct employees or contractors.

But in practice, the Service Company does much more than provide shared, common services. The Service Company manages and operates affiliates. For example, "[w]hile FES is the legal entity that records the sales and costs of the CRES sales in Ohio, the sales and support for the function is provided by the FirstEnergy Service Company."[21] What is more, some business units that clearly provide regulated services are *also* managed and operated by Service Company employees. For example, the chart at page 35 of the Sage Report shows that 9 out of 14 Service Company positions should be reclassified as regulated positions, and the remainder as competitive marketing positions. *None* of the positions provide "shared services" as that term is commonly understood.

Two of the auditor's general findings are aimed squarely at this business structure. First, "[t]he assignment of FES CRES retail sales and service responsibility to the Service Company and the designation of FES CRES sales and service leaders as Shared Services Employees is highly inappropriate."[22] And second, "[t]he FERC classification designations for Shared Services Employee and Shared Senior Officer are overused."[23]

The Service Company fulfills the very same role for Suvon as it did for FES. Like FES, most of Suvon's principal officers and directors are employed by the Service Company. Any *structural* separation achieved by establishing the Service Company and Suvon as separate corporate entities is completely undermined by a lack of *functional* separation. This is a problem

[21] Sage Report at 11.
[22] *Id*. at 34.
[23] *Id*. at 35.

because the Service Company also runs a business unit called "FirstEnergy Products" (FEP) "with both FES unregulated and FEP regulated functions."[24] So the same people who support Suvon's sale of non-electric products and services also support the Companies' sale of the same products and services. The Companies and Suvon do not and cannot "function independently" when they are managed by the same people. Like FES, Suvon is also an alter ego of the Service Company.

The Service Company should not facilitate the flow of information between regulated and unregulated businesses. "However, there are ample opportunities for the different classification employees to interact and inadvertently share restricted information."[25] Remarkably, despite filing its corporate separation plan in 2009, "FirstEnergy's biennial Affiliate Restrictions training program was introduced in late-August 2017 and is still in progress."[26] Physical separation is virtually non-existent, and virtual communication is widely available since "[a]ny employee can send an e-mail to any other employee."[27] Most remarkable of all, the Companies' plan "*is not designed and does not apply otherwise to restrict the exchange or use of information, financing, employees, or facilities among the Companies . . . or FirstEnergy Service Company* [.]"[28]

To characterize the Companies corporate separation plan as an attempt at artful compliance is an understatement. The Service Company was set up to function as a conduit for the ready flow of information among affiliates and exempted from the requirements that drive the need for corporate separation in the first place. *All* affiliates are subject to R.C. 4928.17, whether FirstEnergy wants them to be or not.

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[24] Sage Report at 14.
[25] *Id.* at 61.
[26] *Id*. at 61.
[27] *Id*. at 62.
[28] *Id*. at 20 (emphasis added).

B. The Sage Report and the Companies' admissions validate RESA's Complaint.

The Companies argue that their "Commission-approved Corporate Separation Plan and tariffs allow sales of products and services other than retail electric service."[29] The Companies are wrong.

The corporate separation plan states that 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."[30] The Companies "special customer services tariff" describes these services as "design and construction of customer substations; resolving power quality problems on customer equipment; providing training programs for construction, operation and maintenance of electrical facilities;" and the like.[31] The tariff specifically *prohibits* these services "except where the Company has informed the customer that such service is available from and may be obtained from other suppliers."[32] "[P]roducts like smart thermostats and light bulbs and services like appliance warrantees and electrician referrals"[33] do not even come close to falling under this tariff. Even if they did, there is no evidence that customers are informed of their right to purchase these goods and services from other providers.

But even the broadest possible interpretation of the special customer services tariff or corporate separation plan cannot trump Ohio law. [cite] R.C. 4928.17(A) says that a corporate separation plan must be "consistent with" several requirements, including a requirement that "[t]he plan provides, at a minimum, for the provision of the competitive retail electric service or

[29] Companies' Supp. Comments at 4.
[30] *See id.* (quoting corporate separation plan).
[31] *See* Ohio Edison Company, P.U.C.O. No. 11, Original Sheet 4, Page 13 of 21, Section X.C., effective January 23, 2009.
[32] *Id*.
[33] Sage Report at 13.

the nonelectric product or service *through a fully separated affiliate of the utility*[.]"[34] The Companies *may not* offer a "competitive retail electric service" or "a product or service other than retail electric service." An *affiliate*—such as Suvon—may offer these services, but only after the Companies implement and operate under a corporate separation plan that lists Suvon as an affiliated service provider. The current plan does not.

If the materials filed in its recent certification proceeding are accurate, then Suvon is *also* selling nonelectric products and services. "In 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."[35] The fact that both Suvon and the Companies are offering the same non-electric products and services merely goes to show how *interdependent* the Companies and their affiliates operate. The law requires *independence*, and neither the Companies nor Suvon comply.

C. The Commission may and should prohibit Suvon from using the FirstEnergy name.

The corporate name issue has been discussed repeatedly in both this proceeding and the Suvon application. Rather than repeat these arguments, RESA would direct the Commission back to the auditor's findings and recommendations.

As the auditors note, "it is impossible" to not make a connection between the Companies and FES due to the common use of the "FirstEnergy" name and logo.[36] The auditors found that "FirstEnergy Solutions' successful competitive retail electric services in the Ohio Companies' territories may be related to its FirstEnergy name."[37] The auditors also determined that "[t]he

[34] R.C. 4928.17(A)(1) (emphasis added).
[35] *Application of Suvon, LLC*, PUCO Case No. 20-103-EL-AGG, Application (Jan. 17, 2019) at Ex. A-13.
[36] Sage Report at 98.
[37] *Id*. at 97.

link to the FES website from the FirstEnergy website provides an unfair advantage."[38] 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."[39]

The fact that the *Companies* are defending their *affiliate's* use of a common trade name is in itself telling. The Companies do not own the FirstEnergy name. They have no standing to complain about who is or is not allowed to use it.

The claim that restricting an affiliate's use of a common trade name would be a "constitutional violation" was considered and rejected in *Texas Commercial & Indus. Retail Ltd. P'ship v. Pub. Util. Comm'n of Texas*, 436 S.W.3d 890 (Tex. App. 2014). Citing U.S. Supreme Court precedent, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it [.]"[40]

The FirstEnergy companies are not the only utilities in Ohio that share a common trade name with affiliates. This case does not involve those other utilities; it involves FirstEnergy. As RESA has noted before, the Companies' corporate separation plan does *not* permit joint advertising among the EDUs and unregulated affiliates. The plan describes the Companies intention to market *their* affiliation *with their parent company* under the "FirstEnergy" trademark.[41] The plan does not authorize the Companies' *affiliates* (such as Suvon) to also use

[38] *Id*. at 98.
[39] *Id*. at 98-99.
[40] *Id*. at 923, quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980).
[41] Case No. 09-462-EL-UNC, Corporate Separation Plan (June 1, 2009) at 6.

the FirstEnergy name or mark to promote competitive products. To the contrary, the plan represents that the EDUs will *not* be involved in joint marketing with unregulated affiliates. "In order to ensure compliance with corporate separation rules and regulations the Companies do not plan to joint advertise or joint market with any unregulated competitive affiliate, and if that position changes, they will advise the Commission."[42]

If the Commission has authority to permit the use of common trade names, then it also has the authority to prohibit this practice. The Commission *must* prohibit this practice when an applicable corporate separation plan does not authorize it. To the extent an affiliate (such as FirstEnergy Corp. or the Service Company) is directing the Companies to brand and market in violation of their code of conduct, the Commission has authority to order the affiliate to cease the unlawful conduct.[43]

III. CONCLUSION

The auditors hired to evaluate the Companies' and their affiliates' compliance with corporate separation do not have skin in the game. These independent auditors have found serious deficiencies; deficiencies that do not simply go away because FES changed its name. The Commission should adopt the auditor's recommendations and grant the other relief requested in these comments.

[42] *Id*.

[43] *See* R.C. 4928.18(B) (conferring jurisdiction to hear complaint for code of conduct violation by "an electric utility or its affiliate")

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Reply Comments of The Retail Energy Supply Association was served by electronic mail on this 15th day of June, 2020 to the following:

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Summary: Comments Supplemental Reply Comments of The Retail Energy Supply Association electronically filed by Ms. Valerie A Cahill on behalf of Retail Energy Supply Association