**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

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**NORTHEAST OHIO PUBLIC ENERGY COUNCIL's**
**COMMENTS TO DAYMARK ENERGY ADVISORS' AUDIT REPORT**

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## I. INTRODUCTION

For more than a year and a half, FirstEnergy Advisors has withheld information from this Commission – and the Ohio Supreme Court – about how its involvement with the HB 6 scandals and, separately, with former Chair Randazzo affected its certification application filed with the PUCO on January 17, 2020.[1] Finally, on November 2, 2021, FirstEnergy Advisors produced shocking new text messages giving a glimpse of how it colluded with the FirstEnergy electric distribution utilities ("FE EDUs") to unlawfully secure the application's approval.[2] The following text exchange occurred on March 3 and 4, 2020, between Dennis Chack, the president of non-regulated FirstEnergy Advisors and Charles Jones, CEO, president and director of the regulated

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[1] See *In re FirstEnergy Advisors Application for a Certificate*, PUCO Case No. 20-103-EL-AGG ("*Case No. 20-103*"), in which corporate separation issues affecting FirstEnergy Advisors were reserved for consideration in this case ("*Case No. 17-974*"). See *Case No. 20-103*, Finding and Order (April 22, 2020).

[2] See *Case No. 20-103*, FirstEnergy Advisors' Motion to Withdraw (filed November 2, 2021). In its motion to withdraw its application, FirstEnergy Advisors feigns contrition and asks the Commission to absolve its sins by permitting it to withdraw the tainted application in favor of a new start – all to avoid consideration of the March 3-4 text exchange. The Commission's rules require consequences for FirstEnergy Advisors unconscionable unlawful acts. FirstEnergy Advisors' motion was filed November 2, 2021, at approximately 4:20 p.m. Neither NOPEC nor any other party to the proceeding was permitted to file a memo contra the motion, as permitted under O.A.C. 4901-1-12. The Commission issued its order granting the motion to withdraw at approximately 2:00 p.m. on November 3 – only about seven (7) business hours after it was filed. The Northeast Ohio Public Energy Council intends to exercise its rights to seek rehearing and, if necessary, appeal.

FE EDUs. The exchange details the *ex parte* communications[3] that Jones had with former PUCO Chair Randazzo, at Chack's behest:

> Dennis Chack [March 3, 2020]: Any luck on talking with Sam [Randazzo] on energy license[? W]e just received request for additional comments
>
> Charles Jones [March 4, 2020]: He will get it done for us but cannot just jettison all process. Says the combination of overruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us? He'll move it as fast as he can. Better come up with a short term work around.
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> Dennis Check: Ok thanks for discussing with him. ***

See Attachment A. This withheld text exchange is an appalling dark cloud on the integrity of the Commission. Its recent release requires that: (1) the procedural schedule in this proceeding be postponed pending completion of a supplemental audit, (2) the Commission find additional corporate separation violations in addition to those already identified by two independent auditors, and (3) the Commission assess stringent penalties to penalize FirstEnergy for its unlawful behavior and to prevent repeated behavior in the future. The penalty should include a ban of FE EDU affiliates providing competitive retail electric services ("CRES") in this state for a period of at least five (5) years.

### A. A supplemental audit is required to investigate the collusion among FirstEnergy Advisors, the FirstEnergy EDUs and former Chair Randazzo to secure affiliate FirstEnergy Advisors' certification and to investigate the HB 6 scandal's effect of corporate separation.

Daymark Energy Advisors' ("Daymark") corporate separation investigation is incomplete in two respects: (1) it failed to investigate any FE EDU activities involving tainted HB 6 that relate to corporate separation, and (2) it failed to investigate the collusion among FirstEnergy Advisors,

[3] The communication about the pending certification application was unlawful under R.C. 4903.081, and compounds the multiple electric utility corporate separation violations discussed below.

the FE EDUs and former Chair Randazzo to secure FirstEnergy Advisors' certification as a power broker and aggregator in *Case No. 20-103*.

Daymark was required to, but did not, investigate the HB 6 scandals' effect on the corporate separation issues raised in this proceeding. Those issues included whether the FE EDUs' captive customers contributed to the funds that FirstEnergy paid to state officials for favorable treatment in securing a bailout for FirstEnergy Corp's nuclear fleet. Use of distribution customers' funds for political and charitable purposes – as well as to benefit affiliated nuclear generation assets – goes to the core of corporate separation governance.

This case involves a separate, but related, scandal involving FirstEnergy's multi-million dollar payments to former PUCO Chair Randazzo in exchange for fixing numerous high stakes cases for FirstEnergy at the PUCO. FirstEnergy Advisors just revealed, on November 2, 2021, that its highly contested certification case was one of the cases that former Chair Randazzo "fixed." Considering that FirstEnergy Advisors exploded this bombshell just a few weeks ago – after Daymark completed its audit (and, conveniently after litigation in *Case No. 20-103* concluded) – the Commission should suspend the procedural schedule in this case pending the completion of Daymark's investigation. To support its position, NOPEC incorporates by reference the joint motion filed in this proceeding on November 5, 2021. See *Motion for Supplemental Audit, et al*., filed November 5, 2021, by the Office of the Ohio Consumers' Counsel ("OCC") and the Northeast Ohio Public Energy Council ("NOPEC").

### B. The shocking new text messages provide indisputable evidence of corporate separation violations in addition to those already identified by two independent auditors.

The bombshell text messages indisputably show that the FE EDUs and FirstEnergy Advisors colluded to gain approval of the latter's CRES certification application. Clearly, the

affiliates were not functioning independently of each other as required by R.C. 4928.17(A)(1)[4] and O.A.C. 4901:1-37-04(A)(1).[5] More damning, the messages show that non-regulated FirstEnergy Advisors relied on the regulated FE EDUs, and their market power, to gain favorable treatment over its competitors, in violation of O.A.C. 4901:1-37-04(A)(8), as discussed further below.

The text exchange begs the question: Why did the FE EDUs and FirstEnergy Advisors engage in such unlawful conduct if FirstEnergy Advisors' certification application was on the "up and up"? The Commission only needs to look at the previous SAGE Management Consultants' audit report ("SAGE Report") submitted in this proceeding on May 14, 2018. The SAGE Report found that the regulated FE EDUs violated the corporate separation statute (R.C. 4928.17) and the PUCO's corporate separation code of conduct (O.A.C. Chapter 4901:1-37) in two significant respects:

1. by sharing the FirstEnergy name and logo with their non-regulated affiliate (then FirstEnergy Solutions) in violation of O.A.C. 4901:1-37-04(D)(7), and
2. by sharing ***a single senior officer*** with their non-regulated affiliate (then FirstEnergy Solutions) through their shared affiliate, FirstEnergy Service Company ("FESC"), which violates O.A.C 4901:1-37-04(D)(3).

Despite these findings, FirstEnergy Advisors had the gall in its certification case to propose using the FirstEnergy name and logo again, and to share not one, but ***all of its senior management***

[4] R.C. 4928.17(A)(1) provides, in part:

> (A)*** no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
>
> (1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service ***through a fully separated affiliate of the utility***, [Emphasis added.]

[5] O.A.C. 4901:1-37-04(A)(1) provides:

> Each electric utility and its affiliates that provide services to customers within the electric utility's service territory ***shall function independently of each other***. [Emphasis added.]

***officials*** with the FE EDUs. It colluded with the FE EDUs and former Chair Randazzo to obtain an operating certificate without further PUCO scrutiny of these outstanding violations under applicable certification standards,[6] in the face of unanimous opposition to its certification application by all 8 intervenors in the case.

Not surprisingly, Daymark in its report filed September 13, 2021 ("Daymark Report") confirmed the SAGE Report's finding as to the prohibited use of the common brand name and logo, as well as sharing employees through FESC. However, dropping its own bombshell, the Daymark Report found that FirstEnergy Advisors has never operated as a structurally separate affiliate.[7] Thus, FirstEnergy Advisors has continuously violated the electric utility corporate separation rules from the time of its certification (April 22, 2020), through at least the end of this audit period (October 31, 2021), confirming its ***per se*** violation of R.C. 4928.17(A)(1) and O.A.C. 4901:1-37-04(A)(1), as well as O.A.C. 4901:1-37-04(A)(4).[8]

NOPEC (and numerous other parties) have requested the PUCO to recognize these violations, and bar these activities, in two different proceedings.[9] After the issuance of similar

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[6] See O.A.C. 4901:1-24-10(C)(1) and (2), which require a CRES applicant to show that it is fit and capable of providing service and complying with the Commission's rules. Of course, ongoing violations of the Commission's corporate separation rules, as found in the SAGE Report, would operate to deny FirstEnergy Advisors a certificate to provide service in Ohio.

[7] See Daymark Report at 69-70 and fn. 129.

[8] O.A.C. 4901:1-37-04(A)(4) provides:

> An electric utility may not share employees and/or facilities with any affiliate, if the sharing, in any way, violates paragraph (D) of this rule.

[9] See NOPEC's Comments and Reply Comments to the SAGE Report, filed in this proceeding on December 31, 2018 and January 7, 2019, respectively, which are incorporated by reference herein. NOPEC's extensive pleadings in *Case No. 20-103*, including the Joint Motion to Suspend FirstEnergy Advisors' Application and Reply to FirstEnergy Advisors' Memorandum Contra (February 10, 2020 and February 25, 2020, respectively); Response to Supplemental Application and Staff's Recommendation (April 14, 2020); Application for Rehearing (May 22, 2020). NOPEC's Supplemental and Supplemental Reply Comments filed in this proceeding (May 29, 2020 and June 15, 202, respectively) pursuant to the Attorney Examiner's Entry of April 29, 2020 and in response to the PUCO's Opinion and Order in *Case No. 20-103*, Opinion and Order (April 20, 2020). NOPEC's pleadings in *Case No. 20-103* are attached as Attachment B and incorporated by reference herein. See, also *In re FirstEnergy Advisors*, 2021-Ohio-3630, 2021 WL 4783198 (October 14, 2021) Supreme Court No. 20-1009, Appellant Merit and Reply Briefs (October

recommendations of two independent auditors spanning over three years, the time is well overdue for the Commission to act decisively.

### C. Stringent penalties must be assessed against the FirstEnergy EDUs and their subsidiaries and affiliates to penalize them for their insidious behavior and to prevent its repeat in the future, including civil forfeitures and a ban on FE EDU affiliate CRES operations in this state for at least five (5) years.

In taking action, the PUCO should bear in mind that the scope of the Daymark audit was to review the FE EDUs' compliance with R.C. 4928.17 and O.A.C. Chapter 4901:1-37 during the period from November 1, 2016 through October 31, 2020.[10] The purpose was not merely to revise the FE EDUs' woefully inadequate corporate separation plan[11] for prospective application, but to hold the FE EDUs' and their affiliates accountable for past violations, including those involving their corrupt behavior associated with the HB 6 scandals and, separately, involving former PUCO Chair Randazzo. Accordingly, NOPEC respectively requests the Commission to assess, after hearing, civil forfeitures for each violation of R.C. 4928.17 and O.A.C. Chapter 4901:1-37 found as a result of this, and all supplemental, investigations.

Further, to ensure that the FE EDUs (or other EDUs in this state) do not engage in similar unlawful conduct in the future – to the harm of Ohio's competitive market and its consumers – the Commission should bar FirstEnergy Advisors, or any FE EDU affiliate or subsidiary, from providing competitive retail electric service ("CRES") in this state for a period of at least five (5) years. This penalty is supported by Commission precedent, as discussed below.

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26, 2020 and January 25, 2021, respectively) and Request for Administrative Notice of the corrupt relationship between FirstEnergy and former Chair Randazzo (March 29, 2021). NOPEC's filings with the Ohio Supreme Court are attached as Attachment C and incorporated by reference herein.

[10] *Case No. 17-794*, Entry (November 4, 2020).

[11] NOPEC supports OCC's Initial Comments that reveal the extreme deficiencies in the FE EDUs' corporate separation plan and its violations of R.C. 4928.17 and O.A.C. Chapter 4901:1-37. The PUCO should require the FE EDUs to submit a revised corporate separation plan consistent with the SAGE and Daymark reports and OCC's comments, upon which stakeholders then may provide additional comment. In this regard, the PUCO should ensure that the revised plan plainly adheres to O.A.C. Chapter 4901:1-37, rather than incorporating FERC standards, which causes unnecessary and confusing cross-references to FERC's rules.

## II. ARGUMENT

### A. The FE EDUs' collusion with FirstEnergy Advisors indisputably shows that they were not functioning independently of each other as required by R.C. 4928.17(A)(1) and O.A.C. 4901:1-37-04(A)(1), and that the FE EDUs used their considerable market power to gain favorable treatment for FirstEnergy Advisors over its competitors, in violation of O.A.C. 4901:1-37-04(D)(8),

The text message exchange recited above shows that the start-up power broker/aggregator, FirstEnergy Advisors, colluded with its established, regulated affiliates, the FE EDUs, to assist it in obtaining certification from the Commission. The exchange indisputably confirms that FirstEnergy Advisors was not functioning independently from its regulated affiliates – even before (unlawfully) gaining CRES operating authority on April 22, 2020. In addition to the corporate separation violations identified by the two independent auditors discussed below, the Commission also should find violations of R.C. 4928.17(A)(1) and O.A.C. 4901:1-37-04(A)(1) on the basis of this collusion.

This collusion also evidences the FirstEnergy EDUs' blatant abuse of market power. The FE EDUs' parent, FirstEnergy Corp ("FEC") filed its Form 10Q, Quarterly Report with the Securities and Exchange Commission on November 19, 2020, for the period ended September 30, 2020 (the "Form 10Q Report").[12] In the form, FEC admitted that it had paid former Chair Randazzo approximately $4.3 million for "acting at the request or for the benefit of FE as a consequence of receiving such payment…during the time period after such payment during which the Individual was acting in any governmental or regulatory capacity, in each case, as previously disclosed to the Administrative Agent." [13]

[12] See https://www.sec.gov/ix?doc=/Archives/edgar/data/0001031296/000103129620000045/fe20200930.htm

[13] *Id*., Schedule I, Noncompliance Event.

As a result of its actions, FEC entered into a Deferred Prosecution Agreement ("DPA") with the U.S. District Attorney on July 22, 2021,[14] in which FEC agreed to the following statement of facts:

> FirstEnergy Corp. paid the entire $4,333,333 to Company 1 [Sustainability Funding Alliance of Ohio] for Public Official B's [Randazzo's] benefit with the intent and for the purpose that, in return, Public Official B [Randazzo] would perform official action in his capacity as PUCO Chairman to further FirstEnergy Corp.'s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.

FEC also agreed to the following facts:

> In a March 4, 2020 text message exchange about *possible future favorable action* by Public Official B [Randazzo], Executive 1 summarized official action already performed by Public Official B at the request of FirstEnergy…[Emphasis added.]

Now that Chack's March 3, 2020, text message finally has been disclosed, it is apparent that this "possible future favorable action" relates to Chack's corrupt request, through Jones, to have former Chair Randazzo secure approval of FirstEnergy Advisors' certification application without reasonable scrutiny.

The FE EDUs' abused their market power to assist their start-up affiliate obtain a CRES certification in *Case No. 20-103* without the scrutiny required under O.A.C. 4901:1-24-10(C)(1) and (2).[15] See *In Re FirstEnergy Advisors*, 2021-Ohio-3630, 2021 WL 4783198 (October 14, 2021) (*Case No. 20-103* was reversed and remanded for the Commission make the required findings under these provisions before granting certification).

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[14] Deferred Prosecution Agreement, *United States v. FirstEnergy Corp.*, No. 21-cr-00086 (S.D. Ohio, July 22, 2021).

[15] See O.A.C. 4901:1-24-10(C)(1) and (2) (the standard for certificating a competitive retail electric supplier is that it is fit and capable of providing service and complying with the PUCO's rules).

The main purpose of the Commission's corporate separation rules for electric utilities is to prevent the EDUs from abusing their considerable market power (O.A.C. 4901:1-37-02(B)), and in the process preventing harm to consumers. O.A.C. 4901:1-37-04(D)(8) provides:

> The electric utility shall use reasonable efforts to ***ensure retail electric service consumers protection against unreasonable*** sales practices, market deficiencies, and ***market power*** and the electric utility's compliance officer[16] shall promptly report any such unreasonable sales practices, market deficiencies, and market power to the director of the rates and analysis department (or their designee). [Emphasis added.]

The FE EDUs abuse of market power failed to protect, and even harmed, consumers. FirstEnergy Advisors was permitted to solicit and provide service in the marketplace at large, without the protection for consumers that it was fit and capable of providing the services or complying with the Commission's rules. Moreover, FirstEnergy Advisors' individual customers were not protected because FirstEnergy Advisors ultimately was required to withdraw its tainted certification application. Those customers now are still paying for FirstEnergy Advisors' broker's fees, as a part of their negotiated electric supply rates, despite no longer receiving any services from FirstEnergy Advisors.[17]

Moreover, the issue remains outstanding, and subject to OCC and NOPEC's joint request for a supplemental audit, whether distribution customers' funds were used to support the $4.3 million payment to former PUCO Chair Randazzo.

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[16] Conveniently, FirstEnergy Advisors did not make its compliance officer's records available to Daymark for inspection, citing their alleged unavailability due the officer's termination resulting from the HB 6 scandal. Daymark Report at 1. The failure to maintain these records violates R.C. 4928.17(A)(3) and O.A.C. 4901:1-37-07(A). Indeed, why the records are unavailable requires further explanation from the FE EDUs and Daymark and, upon their availability, further supplemental investigation.

[17] See *Case No. 20-103*, Order on Remand (November 3, 2021) vacating the order granting FirstEnergy Advisors' certificate.

**B. The SAGE Report and Daymark Report agree that FirstEnergy Advisors should not be permitted to use the FirstEnergy name and logo.**

1. The May 14, 2018, SAGE Report

The SAGE Report found that the use of the "FirstEnergy" name by an FE EDU-affiliated CRES provider violated the corporate separation code of conduct. SAGE Report at 46, 98-99. The SAGE Report noted that FirstEnergy Corp ("FEC"), the FE EDU's parent, works hard to promote its brand name in Ohio, for example, by acquiring the naming rights for the Cleveland Browns' stadium, and re-naming it "FirstEnergy Stadium." These stand-alone branding successes then are applied to FEC's subsidiaries either as a part of their names (*e.g.*, FirstEnergy Solutions; FirstEnergy Products, and now FirstEnergy Advisors), or in the FE EDUs' descriptions (*e.g.*, Ohio Edison, A FirstEnergy Company). Audit Report at 97-98. Examples of the FirstEnergy Family branding and logo are as follows:

The FE EDUs provided vertically integrated monopoly service (generation, distribution and transmission services) to their customers for decades before the advent of competitive retail

generation service in Ohio in 2000. They continue to provide monopoly distribution and transmission service to all consumers in their service territories as EDUs, and exercise considerable market power. As the SAGE Report found, the widespread use of the "FirstEnergy" name is meant to connote to these customers that an unregulated FirstEnergy CRES affiliate, like FirstEnergy Advisors, is a part of the FirstEnergy family that has been providing "trusted utility service" for years. The natural result of this branding campaign is that when customers are given a list to choose a potential CRES provider, including lists from the Operating Companies' representatives, the customers will give greater consideration to the non-regulated affiliate in making their decisions. Audit Report, at 98. The SAGE Report concluded that an EDU-affiliated CRES provider's use of the "FirstEnergy" name violates the FE 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:

> 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.]

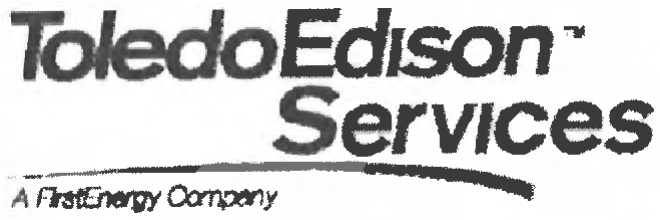
The SAGE Report concludes that, by virtue of using the "FirstEnergy" name, it is impossible for the FE EDUs' representatives ***not*** to "indicate" that a FirstEnergy CRES provider is an affiliate, because they share a common name. Audit Report, at 98. Indeed, by virtue of their widespread branding program, the FE EDUs effectively "endorse" their affiliated CRES providers over other CRES suppliers. *Id.*

Providing a CRES provider list that includes an FE EDU CRES affiliate also violates O.A.C. 4901:1-37-04(D)(9), which provides:

> Employees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated electric services company.

2. The September 13, 2021, Daymark Audit Report

The Daymark Report did not expressly address this issue with respect to FirstEnergy Advisors' use of the "FirstEnergy" name. However, it did so with respect to the FE EDUs' use of the FirstEnergy logo in marketing non-regulated products through FirstEnergy Products. The products were marketed under the FE EDUs' name with the word "services" added, *e.g.*, "Toledo Edison Services." The FirstEnergy logo then was inserted beneath the name, *e.g.*, "A FirstEnergy Company" accompanied with the trademark "swoosh":




See Daymark Report at 73. Similar to the SAGE Report's findings, Daymark recommended that the names and logos be removed from the marketing materials, finding that use of the names and logos capitalized on the FE EDUs' reputation, providing FirstEnergy Products a competitive advantage that other providers of the same services do not have. Daymark Report at 13, 71-79.

However, the products marketed by FirstEnergy Products are not competitive retail electric services, and it is not included on the list of CRES power marketers, aggregators and brokers the FE EDUs are required to provide to consumers. Therefore, unlike the SAGE Report, the Daymark Report did not find a violation of O.A.C. 4901:1-37-04(D)(7), as above; but a violation of O.A.C. 4901:1-37-04(D)(11), which provides:

> Shared representatives or shared employees of the electric utility and affiliated electric services company shall clearly disclose upon whose behalf their public representations are being made when such representations concern the entity's provision of electric services.

3. The use of "disclosures" explaining the relationship between regulated and non-regulated affiliates does not remedy these corporate separation violations.

The Daymark Report also noted that FirstEnergy Products used a footnoted disclosure in an attempt to remedy this corporate separation violation. Daymark rejected the disclosure's use as a remedy, finding that "it is so small the customer is unlikely to read it," and that in any event customers still could assume that FEP also was their utility. Daymark Report at 73-76. The discloser read:

> All services are performed by an independent contractor that is neither an affiliate, nor an agent of FirstEnergy Corp. or its affiliated companies, (FirstEnergy), including the local electric utility company that provides your electric distribution service.

In the April 1, 2020, supplement to its application in *Case No. 20-103*, FirstEnergy Advisors also asserted that it would use the following "disclosure" in its marketing and advertising materials, apparently to remedy the corporate separation violation. The disclosure read:

> 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 "disclosure" is exponentially worse than the above FirstEnergy Products disclosure. The SAGE Report 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 disclosure would be an even more egregious violation of the rule, because it prominently proclaims that FirstEnergy Advisors is an EDU affiliate. The disclosure does not remedy 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 FE EDUs; and
3. Customers will continue to receive the same [impliedly good, old, familiar] regulated services from the FE EDUs.

Since the filing of the supplement to its application in *Case No. 20-103* on April 1, 2020, FirstEnergy Advisors has revised its disclosure and makes explicit what was implied in the above disclosure. The current disclosure on FirstEnergy Advisors' website[18] 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. 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 quality 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, Pennsylvania Electric Company, Jersey Central Power & Light Company, Monongahela Power Company and The Potomac Edison Company. [Emphasis supplied.]

Indeed, in addition to violating O.A.C. 4901:1-37-04(D)(7) and (9), this most recent iteration of FirstEnergy Advisors' "disclosure" also violates O.A.C. 4901:1-37-04(A)(1), which requires regulated and non-regulated affiliates to function independently of each other. The emphasized language above shows that FirstEnergy Advisors is hardly independent of the FE EDUs when it attempts to extoll the quality of service they allegedly provide.

[18] https://www.firstenergyadvisors.com/firstenergyadvisors.html

The Commission should find that FirstEnergy Advisors' (or any affiliated CRES provider's) use of the FirstEnergy name and logo violates R.C. 4928.17(A)(1), O.A.C. 4901:1-37-04(A)(1) and 4901:1-37-04(D)(7), (9) and (11).

4. FirstEnergy Advisors should be assessed a civil penalty for violating the PUCO's Order on Remand issued November 3, 2021, and the PUCO should consider this violation if FirstEnergy Advisors seeks re-certification as a CRES provider.

As stated above, the PUCO vacated FirstEnergy Advisors' certificate by its Order on Remand in *Case No. 20-103* issued November 3, 2021. The PUCO expressly found that FirstEnergy Advisors "may not engage in the marketing, solicitation, sale or provision of aggregation service or power brokerage service" until it has been certified by the Commission to provide such service. Order on Remand, ¶ 11. As of the date of this filing, FirstEnergy Advisors continues to market its services through its website, in violation of the Commission's order. FirstEnergy Advisors should be assessed a civil penalty for its flagrant disregard of the PUCO's order. See, *In Re Buzz Telecom Corporation*, Case No. 06-1443-TP-UNC, Opinion and Order (October 3, 2007) (civil forfeitures assessed for failure to cease and desist solicitations); see, also, *In Re Application of One Source Energy, LLC*, Case No. 16-1181-GA-ACE, Third Finding and Order (August 22, 2019) (PUCO ordered the Attorney General to seek civil penalties from One Source and for One Source to retire and abandon its natural gas system for failure to comply with PUCO rules and orders, including keeping its website activated after being ordered to cease customers solicitations).

The Commission also should take into account FirstEnergy Advisors' inability to comply with Commission rules and orders if it files another certification application. See O.A.C. 4901:1-24-10(C)(2).

### C. FirstEnergy Advisors' employees, including senior officers, directors or managers, must be separate and distinct from those of the regulated FE EDUs, including those shared through FirstEnergy Service Company ("FESC").

1. The May 14, 2018, SAGE Audit Report

The SAGE Report found that it was improper to comingle executive management from an affiliated CRES provider's sales division as part of the senior leadership team of FESC. The auditor found that FESC "primarily serves the FirstEnergy regulated operating companies," and that it was "problematic" for the CRES providers' vice president to attend FESC executive meetings with other FESC executives who were focused on the regulated utility operations.[19] It recommended that the officer be removed from FESC and returned to the unregulated affiliated CRES provider which, at the time, was FirstEnergy Solutions ("FES").[20]

The SAGE Report was noticeably concerned that information could be shared between the FE EDUs and a single FES executive. This concern was exacerbated exponentially upon the formation of FirstEnergy Advisors. Its certification application in *Case No. 20-103* reflects that all three of FirstEnergy Advisors' managers held the highest level executive positions with FirstEnergy Corp. and FirstEnergy Services Company. And two of FirstEnergy Advisors' managers also were directors of the regulated First Energy EDUs.

[19] *Id*. at 39.

[20] *Id*. at 36.

| COMMON MANAGERS/DIRECTORS/EXECUTIVE OFFICERS | | |
|---|---|---|
| FirstEnergy Corp/FirstEnergy Service Company[21] | FirstEnergy Advisors[22] | Regulated Utilities[23] |
| 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 |

In its pleadings throughout *Case No. 20-103*, which are incorporated by reference herein (and attached as Attachment B), NOPEC explained how this sharing of employees was a ***per se*** violation of R.C. 4928.17(A)(1). CRES must be provided through a "fully separated affiliate," and that affiliate must "function independently" of the regulated utility. *Id*., O.A.C. 4901:1-37-04(A)(1) and (4). By placing the same senior executives of the FE EDUs as senior executives of FirstEnergy Advisors, independent functioning was impossible. The FE EDU executives would have knowledge of the EDUs' distribution and transmission systems, which they necessarily must share with themselves as executives of FirstEnergy Advisors. This sharing violates O.A.C. 4901:1-37-04(D)(3).[24] The Daymark Report says it best, finding that it would be impossible for such shared FE EDU employees to erect a "mental barrier" to keep this confidential information from themselves as executives of a non-regulated affiliate. [25]

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

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

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

[24] O.A.C. 4901:1-37-04(D)(3) provides:

> Employees of the electric utility's affiliates shall not have access to any information about the electric utility's transmission or distribution systems (e.g., system operations, capability, price, curtailments, and ancillary services) that is not contemporaneously available, readily accessible, and in the same form and manner available to a nonaffiliated competitor providing retail electric service.

[25] See Daymark Report at 67:

> Internally, a team within FirstEnergy Shared services (Products and Services) markets and sells products and services through both FEP and FirstEnergy Home. Therefore, the regulated and

2. The September 13, 2021 Daymark Report.

Whereas the SAGE Report reviewed FES's corporate structure, the Daymark Report reviewed the corporate structure of FirstEnergy Advisors and dropped a startling bombshell – FirstEnergy Advisors never operated as a structurally separate affiliate.[26] It found at pages 69-70 (footnotes omitted):

> *** Suvon [i.e., FirstEnergy Advisors and FirstEnergy Home] is spread throughout FirstEnergy's corporate structure. Although on FirstEnergy's affiliate organizational chart, Suvon appears as a separate affiliate…***Suvon employees are actually all FirstEnergy Service Company employees…and therefore not a separate affiliate***. There is no entity on the Employee Organization Chart that indicates FirstEnergy Advisors or FirstEnergy Home, nor is it obvious based on anyone's title who works for either organization….Furthermore, the Director of [FirstEnergy Products] Operations reports directly to the VP of Sales, who is a market-function employee of FirstEnergy Service Company assigned to support FirstEnergy Advisors. As we learned throughout the interview process, the Director of [FirstEnergy Products] Operations has access to protected customer information. ***We recommend that Suvon, including FirstEnergy Advisors and FirstEnergy Home, be separated into their own organization within FirstEnergy, and not be considered part of FESC***.
>
> ***Daymark recognizes that in the past, the Commission has allowed shared staff to work for both a competitive services affiliate and distribution utilities. However, in this case, Suvon is a certified competitive retail electric service (CRES) provider and employees are only performing competitive functions***. Previously, FirstEnergy's competitive service arm, FirstEnergy Solutions (FES), was *a* distinct affiliate that was not under FirstEnergy Service Company. Separating Suvon from FESC would clarify who works for the competitive business, as currently there appears to be confusion, and would also provide an additional protection against inadvertent sharing of information. It also makes cost allocation much more straight forward, avoiding any potential for cross-subsidization. [Emphasis supplied.}

unregulated operations and responsibilities of selling products and services are within the same internal group. The team could have access to confidential customer information as they provide support to FEP. It is challenging for the internal team supporting both FEP and FirstEnergy Home to maintain a 'mental barrier' and keep confidential information, which they have access to as they support FEP, aside while they are marketing on behalf of FirstEnergy Home.

[26] See Daymark Report at fn. 129.

For purposes of the Commission assessing penalties and forfeitures for violations of the corporate separate rules during the audit period, the Commission should adopt Daymark's analysis. FirstEnergy Advisors never operated as a "fully separated affiliate," or "function[ed] independently" as required by R.C. 4928.17(A)(1) and O.A.C. 4901:1-37-04(A)(1) and (4). For purposes of adherence to the corporate separation rules in the future, FirstEnergy Advisors must be structured as a physically separate CRES affiliate.

3. FirstEnergy Advisors' should be physically separated from the FE EDUs and FESC in a building separate from FEC headquarters at 176 South Main Street, Akron, Ohio.

The SAGE Report and Daymark Report each were concerned with the lack of physical separation between regulated and nonregulated employees.[27] While the SAGE Report addressed the physical separation of FES employees, the Daymark Report addressed the separation of FirstEnergy Advisor employees. Unlike FES, FirstEnergy Advisors' entire affiliate operations will be located along with the EDUs' and FESC's operations in the FEC headquarters at 76 South Main Street in Akron. The co-location of FE EDU and FirstEnergy Advisors' (or any CRES providers') employees presents the opportunity for an exchange of nonpublic information, even though casual conversations in the hallways, break areas, or rest rooms. Especially disturbing is the opportunity for the FE EDUs' employees to provide business leads to FirstEnergy Advisors regarding information on new or expanded developments that require additional distribution service, and thus a need for new generation supply that FirstEnergy Advisors could broker. Sharing this information, intentionally or not, is detrimental to other competitors and the customers they serve. To prevent these anti-competitive activities, the Commission should require FirstEnergy Advisors, and any other FirstEnergy competitive affiliate when and if they are allowed

[27] Sage Report at 36.

to operate again in the State of Ohio, to be housed, as was FES, in a location separate from the FE EDU and FESC employees. The requirement is even more reasonable when considering that none of the FirstEnergy Advisor employees perform any shared services.

### D. The Commission must assess stringent penalties against the FE EDUs and FirstEnergy Advisors to penalize them for their unlawful behavior and to prevent repeat behavior in the future, including civil forfeitures and a ban on FE EDU affiliate CRES operations in this state for at least five (5) years

FirstEnergy Advisors' and the FE EDUs' unlawful conduct in *Case No. 20-103* was beyond reprehensible, not only during Chack's and Jones' collusion with former Chair Randazzo, but continuing even after all three players lost their jobs in October and November 2020. The following summarizes the numerous occasions on which the FE EDUs and FirstEnergy Advisors had the opportunity to stop, but continued to perpetuate their fraud and deceit on this Commission, the Ohio Supreme Court and the parties to this proceeding (including NOPEC). But they continued their deceitful scheme until after the Ohio Supreme Court issued its decision vacating the order granting FirstEnergy Advisors' certification application. FirstEnergy Advisors' fraudulent conduct required the Commission, the Ohio Supreme Court and NOPEC and OCC to expend needless time and resources to litigate, appeal, and overturn tainted *Case No. 20-103*.

1. NOPEC intervened in *Case No. 20-103* on February 10, 2020 and served interrogatories on FirstEnergy Advisors asking it to disclose all communications between FirstEnergy Advisors' senior officials (*e.g.*, Chack) and FE EDU senior officials (*e.g.*, Jones).[28] FirstEnergy Advisors refused to answer any discovery, and the PUCO refused to rule on NOPEC's March 20, 2020 motion to compel the response.[29]
2. FEC filed its Form 10Q Report on November 19, 2020, for the period ended September 30, 2020, and admitted that it had paid former Chair Randazzo $4.3 million to benefit FirstEnergy in cases that FirstEnergy already had disclosed to the Administrative Agent. At the time, Chack, Jones and Randazzo already had colluded on granting the certification application in *Case No. 20-103*.

[28] See NOPEC Motion to Compel (March 20, 2020), RPD 13.

[29] The Ohio Supreme Court found this was error in See, also *In re FirstEnergy Advisors*, 2021-Ohio-3630, 2021 WL 4783198 (October 14, 2021) Supreme Court No. 20-1009.

3. NOPEC filed a motion with the Ohio Supreme Court on March 29, 2021, to take judicial notice of the SEC filing. However, FirstEnergy Advisors' opposed the motion on the basis that the April 22, 2020, order from which the appeal was taken was supported by PUCO Staff and four other commissioners, regardless of former Chair Randazzo's alleged criminal activities. FirstEnergy Advisors ignored Jones' March 4, 2020 text that showed the FE EDUs and FirstEnergy Advisors knew that Randazzo had been "overruling Staff and other Commissioners" on various PUCO cases to the point they were wondering whether he worked for the PUCO or FirstEnergy.

4. NOPEC sought discovery from the FE EDUs on June 7, 2021 in this proceeding (*Case No. 17-974*), again requesting production of the communications between Chack and Jones, as set forth above. FirstEnergy EDUs again refused to produce the contents of the March 3, 2020 emails.

5. FirstEnergy admitted in the Deferred Prosecution Agreement dated July 20, 2021, that it had paid Randazzo over $4.3 million to perform favorable acts, including "possible future acts," which referred to the FirstEnergy CRES application, as evidenced by the March 3-4 text exchange between Chack and Jones.

Yet, throughout the litigation before the Commission and the appeal to the Ohio Supreme Court, FirstEnergy Advisors refused to inform the Commission, the Court and the parties to this proceeding that the certification process was tainted. FirstEnergy Advisors only informed this Commission after the Ohio Supreme ruled against it, causing FirstEnergy Advisors to withdraw what had become a "frivolous" application on November 2, 2021.

FirstEnergy Advisors and the FE EDUs' conduct is so reprehensible that, in addition to assessing civil forfeitures for all violation found of R.C. 4928.17 and O.A.C. Chapter 4901:1-37, the Commission should also bar FirstEnergy Advisors, or any FE EDU affiliate or subsidiary, from providing CRES in this state for a period of five years. This penalty is consistent with that imposed on other competitive provide that engaged in unfair, misleading and deceptive practices against their customers and violating various Commission rules and orders. *In Re PALMco Power*, Case No. 19-2153-GE-COI, Finding and Order (October 20, 2021) (PUCO adopted stipulation prohibiting PALMco from owning a CRES in Ohio for a period of seven (7) years). See, also, *In Re Application of One Source Energy, LLC*, Case No. 16-1181-GA-ACE, Third Finding and Order

(August 22, 2019) (PUCO ordered One Source to retire and abandon its natural gas system for failure to comply with PUCO rules and orders, including keeping its website activated after be ordered to cease customers solicitations).

FirstEnergy Advisors' and the FE EDUs conduct is even more egregious because they not only misled and deceived consumers that they were properly deemed fit and capable to provide service and to comply with the PUCO's rules,[30] but because they continued to deceive this Commission and the Ohio Supreme Court until filing the Chack-Jones text messages on November 2, 2021. The ban will serve to deter: (1) the FE EDUs' and FirstEnergy Advisors' abhorrent and willful disregard of the Commission's corporate separation rules, and (2) the dishonest failure to immediately disclose to the parties through discovery, and to this Commission and the Ohio Supreme Court through pleadings, any corporate corruption that taints PUCO procedures and decisions. The penalty also is appropriate considering that FirstEnergy Advisors' conduct led to the effective abandonment of service for which its customers likely are still paying as a part of their electric supply rates.

## IV. CONCLUSION

For the foregoing reasons, NOPEC respectfully request the PUCO to:

1. Assess civil forfeitures of $25,000 per day (R.C. 4927.18(D)(1)) against the FE EDUs for violating the following electric utility corporate separation rules during the course of the audit period, including any additional violations advanced by other parties to this proceeding or the by the auditor through an independent supplemental audit. As to the violations involving the unlawful certification of FirstEnergy Advisors discussed above, a civil forfeiture of $25,000 per day (plus interest) should be assessed for each of the following violations from the date its application was filed on January 17, 2020:
    - R.C. 4928.17
    - O.A.C. 4901:1-37-04(A)(1) and (4)
    - O.A.C. 4901:1-37-04 (D)(3), (7), (8), (9) and (11)

[30] See O.A.C. 4901:1-24-10(C)(1) and (2).

2. Bar FirstEnergy Advisors, and any FE EDU affiliate or subsidiary, from providing CRES in this state for a period of at least five years.
3. If FirstEnergy Advisors, or any FE EDU affiliate or subsidiary, is ever permitted to operate in Ohio, require that each shall be housed in buildings separate from FE EDU and FESC employees.
4. Order that FE EDUs shall not be permitted to share the same senior management, or legal counsel, with any CRES affiliate or subsidiary.
5. Order the FE EDUs to submit a revised corporate separation plan consistent with the SAGE and Daymark reports and OCC's comments, upon which stakeholders may provide additional comment.
6. Order the FE EDUs' revised corporate separation plan plainly address the requirements of O.A.C. Chapter 4901:1-37 without the need to cross-reference FERC rules.

Respectfully submitted,

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*Attorneys for Northeast Ohio Public Energy Council*

## CERTIFICATE OF SERVICE

In accordance with O.A.C. 4901-1-05, 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 Motion was sent by, or on behalf of, the undersigned counsel to the following parties of record this 22nd day of November 2021.

Dane Stinson (Reg. No. 0019101)

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**ATTACHMENT A**

## Short Message Report

| | |
|---|---|
| Conversations: 1 | Participants: 2 |
| Total Messages: 1 | Date Range: 3/3/2020 |

### Outline of Conversations

**NODISPLAY** 1 message on 3/3/2020 • Charles Jones • Dennis Chack

**Messages in chronological order** (times are shown in GMT -04:00)

**NODISPLAY**

DC **Dennis Chack** 3/3/2020, 11:23 AM

Any luck on talking with Sam on energy license we just received request for additional comments

## Short Message Report

| | |
|---|---|
| Conversations: 1 | Participants: 2 |
| Total Messages: 5 | Date Range: 3/4/2020 |

### Outline of Conversations

**NODISPLAY** 5 messages on 3/4/2020 • Charles Jones • Dennis Chack

**Messages in chronological order** (times are shown in GMT -05:00)

**NODISPLAY**

CJ **Charles Jones** 3/4/2020, 2:57 PM

He will get it done for us but cannot just jettison all process. Says the combination of over ruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us? He'll move it as fast as he can. Better come up with a short term work around.

DC **Dennis Chack** 3:05 PM

Ok thanks for discussing with him. How are you feeling

CJ **Charles Jones** 3:09 PM

[redacted] Stopped by Sam's today on my walk. He has friends down and has been busy but he was out doing some yard work. Walking about 3 miles a day right now. A little bored since I cant golf or even get in the pool. But better than sitting in Ohio. Weather has been beautiful last 3 days.

DC **Dennis Chack** 3:14 PM

It was not the best the days we were there

CJ **Charles Jones** 3:14 PM

I know. Pretty chilly and windy.

**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 Services in the State of Ohio. | ) ) ) ) | Case No. 20-103-EL-AGG |

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**JOINT MOTION TO SUSPEND FIRSTENERGY ADVISORS' CERTIFICATION APPLICATION**
**AND**
**JOINT MOTION FOR HEARING**
**BY**
**NORTHEAST OHIO PUBLIC ENERGY COUNCIL**
**AND**
**OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

The PUCO should suspend the application of Suvon, LLC doing business as FirstEnergy Advisors ("Suvon" or "FirstEnergy Advisors"), before the application is automatically approved within 30 days of filing by operation of Ohio Admin. Code 4901:1-27-10. FirstEnergy Advisors proposes to offer competitive retail electric service (as a broker and aggregator) to retail customers throughout Ohio. FirstEnergy Advisors is an affiliate of the FirstEnergy electric distribution companies (the "FirstEnergy Utilities or "regulated utilities").[1] FirstEnergy Advisors will be managed and controlled by members of the same management team that controls FirstEnergy's regulated utilities. The three managers of FirstEnergy Advisors are the President of FE Utilities and CEO of FE Corp. (Chuck Jones), the President of the FE Ohio Utilities (Dennis Chack) and the Senior Vice President and CFO of FE Corp. (Steve Strah). Moreover, two of the managers (Mr. Jones and Mr. Strah) are directors of the regulated utilities. This commonality of management and

[1] The First Energy Electric Distribution Companies are Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

control is a ***per se*** violation of R.C. 4928.17(A), which requires that a competitive retail electric supplier be "fully separated" from its regulated utilities.

Additionally, the auditor also recommended that the "FirstEnergy" name be removed from FES's name, noting that "[u]sing '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."[2] The Auditor's recommendation was intended to "eliminate affiliate bias."[3]

For good cause shown, the PUCO should suspend FirstEnergy Advisors' application, consistent with Ohio Adm. Code 4901:1-24-10(A)(1). Additionally, the PUCO should set this matter for hearing. There, the PUCO should determine (among other issues) whether FirstEnergy Advisors has the managerial capability to provide competitive retail electric service to consumers in this state, considering the extent to which it will be managed and controlled by the regulated utilities. Competitive retail electric service from FirstEnergy Advisors must be provided as a fully separated affiliate of the FirstEnergy Utilities, in compliance with the PUCO's orders, Ohio rules and Ohio law.[4]

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[2] Audit Report at 98.
[3] Audit Report at 46
[4] Ohio Admin. Code 4901:1-24-05(A).

Respectfully submitted,

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Ohio Consumers' Counsel

*/s/ Angela O'Brien*
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*Attorneys for Northeast Ohio Public Energy Council*

**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 Services in the State of Ohio. | ) ) ) ) | Case No. 20-103-EL-AGG |

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**MEMORANDUM IN SUPPORT**

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## I. Introduction

Suvon currently does business in Ohio as FirstEnergy Home, and provides home energy repair service, home connections for cable and Internet, and home security systems (the "Non-Electric Products and Services").[5] With this application, Suvon seeks certification as a broker and aggregator and intends to do business in Ohio as FirstEnergy Advisors.

Ohio law requires that electric distribution utilities ("EDUs") provide competitive retail electric service through a "fully separated affiliate." That is intended to prevent the monopoly utilities from abusing their market power, to the detriment of competition and consumers.[6] This matters to consumers because consumers depend on the market to bring them reasonably priced electricity service.[7] And it is important to captive monopoly customers that they are protected against unlawfully subsidizing the activities of a utility's unregulated affiliate.

It will be difficult (and, in fact, impossible) for FirstEnergy Advisors to function as a fully separated affiliate of FirstEnergy's utilities[8] if, as its application discloses, it will be

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[5] Certification Application at Attachment A-13.
[6] R.C. 4928.17(A)(1) and (2); R.C. 4928.02..

[7] See Ohio Rev. Code 4928.02, 4928.17, and Ohio Admin. Code Chapter 4901:1-37.

[8] FirstEnergy Corp's Ohio EDU operating companies are Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

managed and controlled by the same people who manage the FirstEnergy utilities' operations. This commonality of management control appears to be so pervasive as to be per se unlawful.

The Northeast Ohio Public Energy Council ("NOPEC") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "Consumer Groups") respectfully request that the Commission: (1) suspend FirstEnergy Advisors' certification application; (2) investigate FirstEnergy's Advisors' management and control structure and operations to determine if they comply with the corporate separation rules and Ohio law. (3) hold a hearing on whether FirstEnergy Advisors possesses the management capability to provide service to Ohioans and comply with Ohio rules and laws. Consumer Groups request that a hearing be held as expeditiously as possible.

## II. Ohio law requires that monopoly electric distribution companies be fully separated from competitive affiliates to protect captive monopoly customers from (among other things) subsidizing utility affiliates' unregulated activities.

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.[9] To achieve that goal, captive monopoly consumers must be protected against subsidizing utility affiliates' unregulated activities.[10]

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:

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[9] Ohio Rev. Code 4928.02(C).

[10] Ohio Rev. Code 4928.02(I).

> (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.[11]
>
> (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,

Ohio Rev. Code 4928.17(A) (emphasis supplied).

The PUCO has yet to thoroughly scrutinize whether the FirstEnergy Utilities are fully complying with Ohio's corporate separation requirements. Indeed, their current separation plan is under investigation in Case No. 17-974-EL-UNC and awaiting the PUCO's consideration of many of the same issues presented by the application in this proceeding.

### A. The FirstEnergy Utilities' corporate separation plans have not been scrutinized by the PUCO.

The FirstEnergy Utilities first separation plan was filed with its electric transition plan in 1999 at the outset of retail electric competition. The plan provided only for "functional" separation and was approved only on an interim basis.[12] That "interim" plan was in place for nine years.

Under the requirements of Substitute Senate Bill 221 ("SB 221"), the FirstEnergy Utilities filed another corporate separation plan in an attempt to comply with the PUCO's corporate separation rules promulgated in 2009 under Ohio Admin. Code Chapter 4901:1-37.

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[11] 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).

[12] *See* Case No. 99-1212-EL-ETP, Opinion and Order (July 19, 2000).

FirstEnergy's plan, however, escaped scrutiny because it was summarily approved "as filed," under a Settlement in the FirstEnergy Utilities' first electric security plan ("ESP").[13]

Finally, as a part of its Investigation of Ohio's Retail Electric Service Market ("*Market Investigation*"), the PUCO 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."[14] The PUCO ordered that each electric distribution utility undergo an audit to ensure compliance with Ohio law.

### B. The purchase power agreement proposed in the FirstEnergy Utilities' ESP IV proceeding demonstrated that they and their competitive affiliates are not fully separated.

The PUCO's Market Investigation was prescient. Approximately three months after the Market Investigation Order was issued, the FirstEnergy Utilities filed their fourth ESP.[15] In their application, the FirstEnergy Utilities sought to subsidize their affiliate-owned power plants through a purchase power agreement ("PPA"), the cost of which was to be charged to captive monopoly customers under a Retail Rate Stability Rider ("Stability Charge Rider "). Under the agreement, the FirstEnergy Utilities would purchase electricity produced from certain FES power plants and sell it into the competitive market. The FirstEnergy Utilities would collect the full cost of the power plants from customers, regardless of the price it received in the market. The power agreement assured FES that it would be made whole for its power plants, no matter what market price it received for the power.

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[13] See Case No. 10-388-EL-SSO, Opinion and Order (August 27, 2010) at 16, 27, approving the CSP filed in Case No. 09-462-EL-UNC.

[14] See Case No. 12-3151-EL-COI, Finding and Order (March 26, 2014) at 16.

[15] See Case No. 14-1297-EL-SSO filed August 4, 2014 ("ESP IV").

Several parties (including OCC) filed at FERC to protect consumers from the FirstEnergy Utilities' power agreement, and FERC ordered the FirstEnergy Utilities to submit the purchase power agreement for federal review before it could be implemented in Ohio. In its order, FERC strongly signaled that the purchase power agreement would unlawfully require the Companies' captive customers to subsidize the Companies' unregulated affiliates and shareholders.[16] Specifically, FERC stated that the costs to be charged to distribution customers would "present the potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility."[17]

The Utilities' purchase power agreement demonstrates that the FirstEnergy Utilities have had significant issues in separating from their competitive affiliates. ESP IV and the FERC Order also show the significant harm that can be done to consumers. And they show the anti-competitive benefits that can be bestowed on competitive affiliates, contrary to fair competition, in the absence of a fully functioning corporate separation plan.

### C. FirstEnergy's current corporate separation plan is flawed as found in the PUCO Market Investigation Audit Report, as to intermingling of executives and use of the FirstEnergy name.

The PUCO opened the audit of the FirstEnergy Utilities' separation plan as directed by the PUCO's Market Investigation, on April 12, 2017. The independent auditor filed its report on May 14, 2018.[18] Among other defects, the auditor found that it was improper to comingle management from the FES' sales division as part of the senior leadership team of FirstEnergy's

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[16] *Elec. Power Supply Ass'n v. FirstEnergy Solutions Corp.,* 155 F.E.R.C, P61, 101, 2016 FERC LEXIS 686 (F.E.R.C. April 27, 2016) ("*FERC Order*").

[17] FERC Order at ¶ 55, quoting Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198.

[18] 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.

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.[19] The auditor also recommended that the "FirstEnergy" name be removed from FES's name, noting that "[u]sing '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."[20] The Auditor's recommendation was intended to "eliminate affiliate bias."[21]

The auditor was aware of the likelihood that FirstEnergy Corp would fully divest FES in the near future and that FirstEnergy Corp's organizational structure could change dramatically. Several parties commented on the Audit Report raising the same corporate separation issues at play in this proceeding. Many commenters explained how the regulated utilities' provision of competitive Non-Electric Products and Services and FES's use of the "FirstEnergy" brand name violated the Companies' corporate separation plan. To date, the PUCO has not issued a ruling in that proceeding.

As foretold in the Audit Report, FirstEnergy Corp's corporate structure has changed, or is about to change, dramatically with the divestiture of FES and the establishment FirstEnergy Advisors. The scant application FirstEnergy Advisors filed in this proceeding offers little – indeed no – assurance that it will operate separately from the regulated utilities. Available

[19] Audit Report at 39.
[20] Audit Report at 98.
[21] Audit Report at 46

information shows that FirstEnergy Advisors is to be managed and controlled by the same key directors and officers that hold positions on either the FirstEnergy Service Company or the FirstEnergy Utilities.

As recognized in the PUCO's Market Investigation, it is imperative that the Commission investigate whether FirstEnergy Utilities' new corporate structure, after the divestiture of FES and with the establishment of FirstEnergy Advisors, could ever comply with Ohio Rev. Code 4928.17 and Ohio Adm. Code 4901:1-37. That compliance is required prior to authorizing FirstEnergy Advisors to provide competitive retail electric services to Ohioans as an aggregator and broker.

## III. FirstEnergy Advisors will be managed and controlled by the same key officers and directors that control the FirstEnergy Utilities.

FirstEnergy Advisors has the burden to show that it has the managerial capability to provide retail electric service to Ohioans and that its certification is in the public interest. Ohio Rev. Code 4928.08(B). It has failed its burden because it has not shown that it is fully separated from its regulated affiliate, FirstEnergy Utilities, as required by law. The *FERC Order* warned of dangers posed to consumers when a monopoly Electric Distribution Utility acts in lockstep with its competitive affiliate.

As dangerous for markets as the regulated utilities relationship was with FES, their relationship with FirstEnergy Advisors is even closer, to the point where management and operational control is blurred. As reflected in the chart below, while FES had no directors in common with FirstEnergy Corp., FirstEnergy Service Company, all 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 utilities:

| COMMON MEMBERS/DIRECTORS/EXECUTIVE OFFICERS | | | |
|---|---|---|---|
| FirstEnergy Solutions[22] | FirstEnergy Corp/FirstEnergy Service Company[23] | FirstEnergy Advisors[24] | Regulated Utilities[25] |
| J.C. Blickle Director | Charles Jones, CEO, Pres FE Utilities (FEC) | Charles Jones, Manager | Charles Jones Director |
| J.C. Boland Director | D.M. Chack, Pres. FE Ohio Utilities (FEC) Sr. VP Mkting/Branding (FESC) | D.M. Chack, Manager | |
| J.M. Gingo Director | S.E. Strah, Sr. VP (FEC) CFO (FESC) | S.E. Strah, Manager | S.E. Strah Director |
| | | | J.E. Pearson Director |
| | | | S.L. Belcher Director |

The concerns about operational control are further exacerbated by the commonality of the most senior key officials in each affiliate. As reflected in the chart below, the senior officers of FirstEnergy Corp and FirstEnergy Service Company are nearly identical to those of the regulated utilities. And FirstEnergy Advisors shares three of the most senior officers of FirstEnergy Corp. and FirstEnergy Service Company.

| COMMON KEY SENIOR OFFICERS | | | |
|---|---|---|---|
| FirstEnergy Solutions [26] | FirstEnergy Corp/ FirstEnergy Serv. Co. [27] | FirstEnergy Advisors [28] | Regulated Utilities [29] |
| | Charles Jones, CEO, Pres. Ohio Utilities (FEC) | | Charles Jones Director |

[22] See FES Renewal Certification Application Case No. 00-1742-EL-CRS, Exhibit A-10 (October 1, 2018).

[23] See firstenergycorp.com/investor/corporate_governance/officers_and_directors.html; investors.firstenergy.com

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

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

[26] See FES Renewal Certification Application Case No. 00-1742-EL-CRS, Exhibit A-10 (October 1, 2018).

[27] See firstenergycorp.com/investor/corporate_governance/officers_and_directors.html; investors.firstenergy.com

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

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

| COMMON KEY SENIOR OFFICERS | | | |
|---|---|---|---|
| FirstEnergy Solutions [26] | FirstEnergy Corp/ FirstEnergy Serv. Co. [27] | FirstEnergy Advisors [28] | Regulated Utilities [29] |
| D.R. Schneider Chair/Pres | D.M. Chack, Pres. Ohio Utilities (FEC) Sr. VP Mkting/Branding (FESC) | D.M. Chack, President | |
| D.A. Moul Pres. FES Gen | S.E. Strah, Sr. VP (FEC) CFO (FESC) | B.W. Reynolds, VP Mkt/Energy Eff. | S.E. Strah CFO |
| J.G. Mellody VP Fuel/Dispatch | S.L. Belcher Sr VP | | S.L. Belcher President |
| K.T. Warvell VP, Sec., CFO | E.L. Yeoah-Amankwah Secretary, Ethics FESC | E.L. Yeoah-Amankwah VP Dep. Gen. Counsel | E.L. Yeoah-Amankwah VP Dep. Gen. Counsel |
| | J.J. Lisowski, Controller Chief Accounting Officer (FESC) | T.M. Ashton Controller | J.J. Lisowski, VP /Controller |
| | R.P., Reffner Gen Counsel FESC | | R.P., Reffner Gen Counsel |
| | K.J. Taylor VP, Operations FE Utilities | | K.J. Taylor VP |
| | | S.R. Staub VP/Treasurer | S.R. Staub VP/Treasurer |
| | | | J.F. Pearson Ex. VP Finance |
| | | L.R. Rader, Director of Sales | |
| | | B.A.Farley V.P. Sales | |

The PUCO Audit Report was correct that it was inappropriate to comingle management from the FES sales division as part of the senior leadership team of FirstEnergy Service Company. That is because the officers would be privy to the regulated utilities' information through FirstEnergy Service Company. That same situation is present here and compounded by the fact that the persons holding the highest level positions with FirstEnergy Corp and FirstEnergy Services Company are nearly identical to those holding the same or similar positions with the FirstEnergy Utilities. All three of FirstEnergy Advisors' members will interact with all

of these officials through FirstEnergy Service Company, at a minimum. Under this proposed management and control structure, FirstEnergy Advisors cannot operate as a fully separated affiliate.

In addition, FirstEnergy Advisors' application lists Brian A. Farley as its Vice President of Sales, and Lorraine M. Rader as its Director of Sales. Mr. Farley and Ms. Rader previously served as key members of FirstEnergy Solutions' aggregation team where they obtained significant competitive retail electric market information.[30] It is impossible under the corporate structure proposed in the application to separate this information from senior FirstEnergy Utility executives who are controlling FirstEnergy Advisors as the three managers of the limited liability company. This is the type of information-sharing about Ohio's competitive retail electric market that the corporate separation statute intended to preclude.

## IV. FirstEnergy Advisors and the regulated utilities' common management and control violates Ohio Rev. Code 4928.17(A)(1).

Ohio Rev. Code 4928.17(A)(1) requires the "provision of the competitive retail electric services and nonelectric product or service through a ***fully separated affiliate*** of the utility." (Emphasis supplied.) The Consumer Groups are aware that structurally separate affiliates are permitted to share employees and services in some instances. But that sharing is only allowed if the employees' activities do not violate the code of conduct per Ohio Admin. Code 4901:1-37-04(D) and are properly accounted for in the cost allocation manual per Ohio Admin. Code 4901:1-37-04(A)(5). Sharing of employees and services would not be allowed in this situation, under the rules.

Ohio Rev. Code 4928.17(A)(1) requires that the utilities' competitive affiliate must pass the threshold test of being "fully separated." As recognized in the PUCO Audit Report, code of

[30] See FirstEnergy Advisors' application at Exhibit B-2 and B-3.

conduct provisions or proper cost allocation will not remedy the fatal corporate separation deficiency in FirstEnergy Advisors' case. That is because the violation concerns the sharing of information between the management of the regulated utilities and FirstEnergy Advisors that other marketers, aggregators and brokers, or Non-Electric competitors are not privy to. A competitive affiliate that is not fully separated from an EDU is unlawful ***per se***, as confirmed by the Commission's rules. Ohio Admin. Code 4901:1-37-04(A)(1) provides that "[e]ach electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other." Also applicable is Ohio Admin. Code 4901:1-37-04(A)(3), which requires that "[a]n electric utility's operating employees and those of its affiliates shall function independently of each other."[31]

FirstEnergy Advisors is not structurally separate from the regulated utilities because of their common control and management. As shown in the above chart, the three managers of FirstEnergy Advisors are the President of FE Utilities and CEO of FE Corp. (Chuck Jones), the President of the FE Ohio Utilities (Dennis Chack) and the Senior Vice President and CFO of FE Corp. (Steve Strah).

Managers of a limited liability company (like FirstEnergy Advisors) are responsible for management of the limited liability company and are similar to directors of a corporation. FirstEnergy Advisors' operation under such utility company management is per se unlawful under Ohio Rev. Code 4928.17(A)(1). It cannot be permitted.

Further, there is nothing in the scant FirstEnergy Advisors' certification application that states who is (or are) the member(s) of this LLC. Moreover, the regulated utilities and

[31] See, also, Ohio Admin. Code 4901:1-37-04(A)(2) and (4) related to shared facilities and shared employees, service and facilities, which provides that the structural safeguards may be waived if the sharing does not violate the code of conduct. Ohio Admin. Code 4901:1-37-04(A)(1) and (3) do not provide for this waiver.

FirstEnergy Advisors are located physically at the same FirstEnergy Ohio Utilities headquarters office: 76 South Main Street, Akron, Ohio. Because its management and control structure appears to be unlawful per se, the PUCO should investigate whether FirstEnergy Advisors lack the managerial capability to provide competitive retail electric service in this state and to comply with Ohio rules and Ohio law.[32]

## V. Doing business as FirstEnergy Advisors violates Ohio Admin. Code 4901:1-37-04(D)(7) and (9).

FirstEnergy Advisors' application also should be suspended because it seeks to operate under the same trade name as the regulated utilities. The Auditor investigating FirstEnergy's corporate separation recommended that FES not be permitted to use the FirstEnergy brand in its name because it violates the code of conduct rules contained Ohio Admin. Code 4901:1-37-04(D). Audit Report at 46, 98-99. Likewise, FirstEnergy Advisors' use of the FirstEnergy brand also violates these same provisions.

To support its recommendation, the Audit Report noted that FE Corp. works hard to promote its brand name in Ohio. For example, it acquired the naming rights for the Cleveland Browns' stadium, re-naming it "FirstEnergy Stadium." These stand-alone corporate brandings then are applied to FirstEnergy Corp.'s subsidiaries either as a part of their names (*e.g.*, FirstEnergy Solutions; FirstEnergy Products, and now FirstEnergy Advisors), or in the descriptions of the regulated utilities (*e.g.*, Ohio Edison, A FirstEnergy Company). Audit Report at 97-98.

The regulated utilities provided vertically integrated monopoly service (generation, distribution and transmission services) to their customers for decades before the advent of

[32] Ohio Rev. Code 4928.08.

competitive retail generation service in Ohio in 2000. They continue to provide monopoly distribution service to all consumers in their service territories. As the Audit Report found, the widespread use of the "FirstEnergy" name connotes to customers that the competitive affiliate is a part of the FirstEnergy family that has been providing "trusted utility service" for years. The natural result of this branding is that customers will give greater consideration to the FirstEnergy affiliate in making their decisions about which supplier to choose. Audit Report, at 98.

The PUCO Auditor concluded that use of the "FirstEnergy" name violated Ohio Admin. Code 4901:1-37-04(D)(7), which provides:

> (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 concluded that, by virtue of using the name "FirstEnergy Solutions," it is impossible for the regulated utilities'' representatives ***not*** to "indicate" that FES 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 CRES affiliate over other CRES suppliers. *Id.*

FirstEnergy Advisors' use of the "FirstEnergy" name violates the Ohio Admin. Code 4901:1-34-04(D)(7) (quoted above), as well as 4901;1-37-04(D)(9) ("[e]employees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated electric services company"). Accordingly, granting FirstEnergy Advisors a certificate to do business would be contrary to the PUCO's rules.

FirstEnergy Advisors' application also must be suspended based on its use of the FirstEnergy brand name, consistent with the recommendations of the Auditor in FirstEnergy's pending corporate separation case. Moreover, Consumer Groups note that the application also is deficient because it fails to provide any information evidencing its registration with the Ohio Secretary of State as required by Attachment A-15 to the application.

## VII. Conclusion

For the foregoing reasons, Consumer Groups respectfully request the Commission to (1) suspend FirstEnergy Advisors' certification application; (2) investigate the failure of FirstEnergy Utilities to comply with the corporate separation laws and rules in Ohio law with respect to this application, and (3) conduct a hearing (as expeditiously as possible) on whether FirstEnergy Advisors possesses the management capability to provide service and comply with Ohio rules, orders and law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

In accordance with O.A.C. 4901-1-05, 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 *Motion to Intervene* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 10th day of February 2020.

Dane Stinson (0019101)

Lorraine Rader
Director, Energy Sales
76 S. Main Street A-GO-17
Akron, OH 44308
lrader@firstenergycorp.com

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

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**in**

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

Summary: Text Joint Motion to suspend first Energy Advisors' Certification Application and Joint Motion for Hearing by Northeast Ohio Public Energy Council and Office of the Ohio Consumers' Counsel electronically filed by Teresa Orahood on behalf of Dane Stinson

**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 Services in the State of Ohio. | ) ) ) ) | Case No. 20-103-EL-AGG |

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**NOPEC-OCC REPLY TO FIRSTENERGY ADVISORS' MEMORANDUM CONTRA THE NOPEC-OCC MOTIONS TO SUSPEND THE CERTIFICATION APPLICATION AND FOR A HEARING**

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## I. Introduction

Ohio law is clear (even if not to FirstEnergy Advisors). 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. This is important to consumers who depend on the market to bring them reasonably priced electricity service.

In their Joint Motion filed February 10, 2020, the Consumer Groups[1] showed that FirstEnergy Advisors'[2] management team is so inseparable from that of its affiliate regulated utilities[3] that it is impossible for FirstEnergy Advisors to function independently. For this reason, FirstEnergy Advisors should not conduct business in Ohio using the management team

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[1] Northeast Ohio Public Energy Council ("NOPEC") and the Office of the Ohio Consumers' Counsel ("OCC").

[2] The applicant, Suvon, LLC ("Suvon") seeks to conduct business in Ohio as "FirstEnergy Advisors." It lists its office at the same 76 S. Main Street, Akron office as the Regulated Utilities headquarters.

[3] FirstEnergy Advisors' affiliated regulated utilities are The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company (the "FirstEnergy Utilities" or "Regulated Utilities").

proposed in its Application. Because the Application lacks an appropriate management team, the Commission should conclude that FirstEnergy Advisors has failed to show that it has the managerial capability to provide competitive retail electric service in Ohio. R.C. 4928.08(B); 4901:1-37-10(C)(2).

The Application also should not conduct business in Ohio under the "FirstEnergy" brand name. As explained in the Consumer Groups' Joint Motion, Suvon's use of the Regulated Utilities' name violates O.A.C. 4901:1-37-04(D)(7). Joint Motion at 15-17. Contrary to FirstEnergy Advisors' assertion, use of the FirstEnergy name also is unfair and misleading, in violation of R.C. 4928.10 and O.A.C. 4901:1-21-03(A).

For consumer protection, the PUCO should deny this Application unless Suvon (1) changes its managers and officers so that they do not overlap with the regulated utility's directors and officers, (2) agrees not to conduct business in Ohio under the "FirstEnergy" brand name, and (3) changes its physical headquarters so that it is not housed in the same offices as personnel of the FirstEnergy Utilities at 76 South Main Street, Akron, Ohio. Alternatively, the PUCO should conduct a hearing in this matter as expeditiously as possible, with a schedule that provides ample opportunity to conduct discovery.

FirstEnergy Advisors' arguments raised in its Memorandum Contra filed February 18, 2020, offer absolutely nothing to change this conclusion.

## II. FirstEnergy Advisors' arguments against suspension of its application are moot, because the PUCO has suspended it.

FirstEnergy Advisors first argues that the PUCO long ago resolved the issues raised in the Consumer Groups' Joint Motion. It states that the PUCO has no basis to suspend the Application. Memorandum Contra at 10. However, the PUCO suspended the Application for

"good cause" the day after the Consumer Groups requested it.[4] FirstEnergy Advisors' claim that the suspension is unwarranted is moot.[5] Having found good cause to suspend the Application, the PUCO has rightfully determined that the issues raised by the Joint Motion are not settled and are appropriate for further review in this proceeding.

## III. FirstEnergy Corp's history of managing affiliate relationships does not justify granting this Application.

FirstEnergy Advisors claims that its Application should be granted because FirstEnergy Corp has operated affiliated competitive retail energy suppliers for nearly 20 years without incident. FirstEnergy Advisors asserts that it will continue to follow the Regulated Utilities' current corporate separation plan (the "Plan") if the Application is approved.[6] Memorandum Contra at 4-5.

But FirstEnergy Advisors' promise to abide by the Plan does little to protect customers from potential market abuse. As explained in the Joint Motion, FirstEnergy Advisors ignores that:

(A) the Commission has never conducted an in-depth review of the Plan to determine if the affiliated competitive retail electric service provider and Regulated Utilities "function independently;"

(B) the Plan failed to protect consumers from the FirstEnergy Utilities' attempt to force captive distribution customers to bail out their financially struggling competitive retail electric service provider affiliate;[7] and

(C) the Plan did not prevent the inappropriate sharing of employees and the FirstEnergy brand name.[8]

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[4] Entry, February 11, 2020.

[5] FirstEnergy Advisors has not opposed NOPEC's or OCC's motions to intervene filed February 10, 2020. The motions should be granted.

[6] The FirstEnergy Utilities are responsible for compliance with their corporate separation plan. FirstEnergy Advisor's defense of the plan is further evidence that it does not function independently of its regulated affiliates.

[7] See Case No. 14-1297-EL-SSO filed August 4, 2014 ("ESP IV").

[8] 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").

FirstEnergy Advisors urges the Commission to ignore this history. Memorandum Contra at 10. However, this history forms the basis of the Joint Motion's recommendations and the reasons why the Commission suspended this Application for further consideration. It is a vital part of this proceeding (see, Joint Motion at 6-10) and is summarized as follows for the Commission's further review:

**A. The FirstEnergy Utilities' corporate separation plan has escaped in-depth review.**

Beginning in the year 2000, the FirstEnergy Utilities operated under a plan that merely "functionally" separated the affiliates.[9] In 2009, the Regulated Utilities proposed the current Plan. The Plan was approved "as filed" as a part of the broad stipulated package that adopted the FirstEnergy Utilities' electric security plan.[10] The Plan has escaped the Commission's in-depth review, until recently when the PUCO ordered an audit of all utilities' corporate separation plans to ensure compliance with Ohio law. It would be a mistake to disregard that recent audit and give the FirstEnergy Utilities a pass, based on an approved plan nine years ago. Years later, it cannot be relied upon to protect consumers and preserve the state policy codified in R.C. 4928.02.

**B. The power purchase agreement proposed in FirstEnergy's fourth electric security plan (ESP IV) exposed the insufficient protection that the Plan provides to FirstEnergy's captive distribution customers.**

FirstEnergy Advisors' claim that the Regulated Utilities' Plan has protected captive distribution customers for nearly 20 years is simply not true. The Regulated Utilities' power purchase agreement ("PPA") proposed in ESP IV is emblematic of utility affiliate abuses in Ohio.

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[9] *See* Case No. 99-1212-EL-ETP, Opinion and Order (July 19, 2000).

[10] See Case No. 10-388-EL-SSO, Opinion and Order (August 27, 2010) at 16, 27, approving the Plan filed in Case No. 09-462-EL-UNC.

It was under the current Plan that the FirstEnergy companies[11] developed the scheme to require FirstEnergy customers to subsidize the failing power plants of their affiliate (FirstEnergy Solutions). The Federal Energy Regulatory Commission ("FERC") interceded (upon legal action by OCC, power plant owners and others) and signaled that the PPA negotiated between the FirstEnergy Utilities and FirstEnergy Solutions would unlawfully require the Regulated Utilities' captive customers to subsidize FirstEnergy Solutions.[12] ESP IV showed that the regulated utilities' Plan is insufficient to "effectuate the policy specified in section 4928.02 of the Revised Code." R.C. 4928.17(A)(1) and 4928.17(C). These policies include the prohibition against cross-subsidization and the prevention of market power abuses that were evident in the PPA scheme. See R.C. 4928.02(C), (H) and (I).

### C. The 2018 independent audit of the Regulated Utilities' Plan confirms that FirstEnergy Advisors must change its management team, brand name, and headquarters location if it is to be certified to provide competitive retail electric service provider in this state.

The PUCO recognized the need to revisit all regulated utilities' corporate separation plans as a part of its Investigation of Ohio's Retail Electric Service Market ("*Market Investigation*"). In that case, the PUCO stated 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

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[11] FirstEnergy Corp, FirstEnergy Service Company, the FirstEnergy Utilities, and their affiliated competitive retail electric service provider, FirstEnergy Solutions.

[12] *Elec. Power Supply Ass'n v. FirstEnergy Solutions Corp.,* 155 F.E.R.C, P61, 101, 2016 FERC LEXIS 686 (F.E.R.C. April 27, 2016) ("*FERC Order*"). Specifically, FERC found that the costs to be charged to distribution customers would "present the potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility." Id. at ¶ 55, quoting Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198.

Ohio Rev. Code 4928.02."[13] The PUCO ordered that each electric distribution utility undergo an audit to ensure compliance with Ohio law.

SAGE Management Consultants completed an audit of the FirstEnergy Utilities' Plan and recommended that:

1. a key officer of a competitive retail electric service provider affiliated with the Regulated Utilities not be shared with FirstEnergy Services Company because he or she would receive both regulated and unregulated reports, [14] and
2. the affiliated competitive retail electric service provider be prevented from using the "FirstEnergy" name.[15]

The Audit Report's independent findings and recommendations confirm that the sharing of a single key officer can violate the Regulated Utilities' Plan. This violation is compounded in this proceeding where nearly all key executive officers, managers and directors of FirstEnergy Advisors and the Regulated Utilities are identical, as discussed further below. Moreover, Suvon intends to use the FirstEnergy brand name (d/b/a FirstEnergy Advisors), which the Audit Report concluded was expressly forbidden by the PUCO's rules, which also is discussed below.

The Consumer Groups appreciate that the PUCO acted quickly to suspend this Application. The PUCO should apply the findings of the Audit Report in this proceeding. To protect consumers against the abuse of market power (R.C. 4928.02), the Consumer Groups request that the Commission deny FirstEnergy Advisors' certificate Application unless it changes its management team (ridding itself of overlapping directors, managers and officers), agrees not to conduction business in Ohio under the "FirstEnergy" brand name, and changes the affiliate's physical headquarters so that it is not housed in the same offices as personnel of the FirstEnergy Utilities at 76 South Main Street, Akron, Ohio.

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[13] See Case No. 12-3151-EL-COI, Finding and Order (March 26, 2014) at 16.

[14] Audit Report at 34.

[15] *Id.*, at 98-99.

## IV. Forming a competitive retail electric service providers that is legally separate from its regulated affiliates and allocating shared employees' time between the two does not mean that the affiliates "function independently" as required by O.A.C. 4901:1-37-04(A)(1). These acts do nothing for consumer protection.

FirstEnergy Advisors asserts that its proposed management and operations are compliant with the PUCO's corporate separation rules because:

(A) as a limited liability company, it is "legally separate" from the FirstEnergy Utilities, and

(B) a separate legal entity has no restrictions on the use of shared employees as long as they record and charge their time based on fully allocated costs under O.A.C. 4901:1-21-37(A)(5).

Memorandum Contra at 2 and 4.

Its Memorandum Contra shows that FirstEnergy Advisors' does not understand the legal basis for the Consumer Groups' position. More importantly, FirstEnergy Advisors does not understand, or it chooses to disregard, the PUCO's corporate separation rules.

### A. Creating a separate legal entity is insufficient, standing alone, to comply with the requirement that a competitive retail electric supplier and its regulated affiliates be "fully separated." It is insufficient to adequately protect consumers.

FirstEnergy Advisors argues that it is "fully separated" from the FirstEnergy's Utilities because, as a limited liability company, it is a distinct legal entity. R.C. 4928.17(A)(1) requires that competitive and regulated affiliates be "fully separated." Although the term "fully separated" naturally requires that the affiliates be separate *legal* entities, it also requires that the entities "function independently" of each other. O.A.C. 4901:1-37-04(A)(1). Legal separation alone is insufficient.

A competitive retail electric service provider and its affiliated regulated utilities can be legally separate entities but still not function independently, if controlled and operated by the same management team. The Audit Report confirms 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) though interaction with each other, including interactions associated with both entities use of FirstEnergy Service Company.[16]

This problem is exponentially exacerbated in this proceeding. The Audit Report involved only one officer of FirstEnergy Solutions who was shared with FirstEnergy Service Company and therefore privy to regulated and unregulated reports. Under this Application, all three of FirstEnergy Advisors' managers - in a limited liability company, akin to the directors of a corporation - 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 Utilities.

| **COMMON MANAGERS/DIRECTORS/EXECUTIVE OFFICERS** | | |
|---|---|---|
| FirstEnergy Corp/FirstEnergy Service Company[17] | FirstEnergy Advisors[18] | Regulated Utilities[19] |
| Charles Jones,<br>CEO, Pres FE Utilities (FEC) | Charles Jones,<br>Manager | Charles Jones<br>Director |
| D.M. Chack, Pres. FE Ohio Utilities (FEC)<br>Sr. VP Mkting/Branding (FESC) | D.M. Chack,<br>Manager | |
| S.E. Strah, Sr. VP (FEC)<br>CFO (FESC) | S.E. Strah,<br>Manager | S.E. Strah<br>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. Further, the

[16] Audit Report at 34.

[17] See firstenergycorp.com/investor/corporate_governance/officers_and_directors.html; investors.firstenergy.com

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

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

Regulated Utilities' and FirstEnergy Advisors' officers and employees are all housed in the same building: 76 S. Main Street, Akron offices of the Regulated Utilities.

**B. The method for allocating shared employee costs under O.A.C. 4901:1-37-04(A)(5) is irrelevant when the issue in this proceeding is whether, for consumer protection, it is lawful to share employees in the first place. Sharing employees is not permitted when it is so pervasive that affiliated entities cannot function independently, as required by O.A.C. 4901:1-37-04(A)(1).**

FirstEnergy Advisors further alleges that the PUCO's rules place no restrictions on sharing officers and directors as long as they "appropriately record and charge their time based on fully allocated costs." O.A.C. 4901:1-37-04(A)(5). FirstEnergy Advisors completely misses the point. The corporate separation rules[20] are structured such that employees may be shared only if they do not violate the code of conduct provisions of O.A.C. 4901:1-37-04(D). See O.A.C. 4901:1-37-04(2) and (4). If employees are shared, the sole function of O.A.C. 4901:1-37-04(A)(5) is to provide how their costs are to be allocated between the sharing entities.

These rules are not determinative of this case. This case is not about allocating shared employee costs under O.A.C. 4901:1-37-04(A)(5). Here, the issue is whether it is lawful to share employees in the first place. Sharing employees is not permitted when it is so pervasive that

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[20] O.A.C. 4901:1-37-04 provides in part:

(A) Structural safeguards.

(1) Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other.

(2) Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall not share facilities and services if such sharing in any way violates paragraph (D) of this rule.

(3) Cross-subsidies between an electric utility and its affiliates are prohibited. An electric utility's operating employees and those of its affiliates shall function independently of each other.

(4) An electric utility may not share employees and/or facilities with any affiliate, if the sharing, in any way, violates paragraph (D) of this rule.

(5) An electric utility shall ensure that all shared employees appropriately record and charge their time based on fully allocated costs.

affiliated entities cannot function independently of each other, as required by O.A.C. 4901:1-37-04(A)(1) and by R.C. 4928.17 (must provide competitive service as a fully separated affiliate).

Cost allocation measures are not germane in this situation. Although an executive's time spent between regulated and non-regulated activities can be assigned to either entity, there is no way to segregate the executive's knowledge of regulated operations when making decisions affecting the non-regulated affiliate, and vice versa. The Audit Report recognizes this impossibility and ESP IV demonstrates its practical harm to consumers.

## V. FirstEnergy Advisors' use of the FirstEnergy brand name can be misleading for consumers, and violates the corporate separation rules.

FirstEnergy Advisors then argues that the PUCO long ago settled whether a competitive affiliate may use a regulated utility's trade name. It cites a 2012 rulemaking proceeding in which the PUCO found that the practice should "not…necessarily" be prohibited "absent other circumstances indicating that use of the name is unfair, misleading, or deceptive."[21] These other circumstances are ever present in this case, considering that FirstEnergy Solutions is exiting the competitive retail electric market and ceasing to use the FirstEnergy name at the time Suvon (d/b/a FirstEnergy Advisors) is entering and seeking to use the FirstEnergy name.

FirstEnergy Solutions solicited customers as a power marketer. FirstEnergy Advisors now proposes to solicit those same customers as a broker and/or aggregator. Customers will be confused and misled as to whether it is their traditional regulated utility that is offering to serve them, as recognized in the Audit Report. They also will be confused as to whether it is FirstEnergy Solutions that is continuing to offer service. Of course, as the Audit Report states, use of the same name implies a link between the competitive retail energy service provider and

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[21] See *In Re Review of Chapters 4901:1-21 and 4901:1-24, Ohio Administrative Code*, Case No. 12-1924-EL-ORD, Finding and Order (December 18, 2013) at 18 ("Case No. 12-1924")..

the Regulated Utilities. This implied linkage will enable FirstEnergy Advisors to trade on FirstEnergy's name recognition and interfere with the competitive market. (Audit Report at 98-99.) Use of the FirstEnergy brand name under these circumstances is an unfair marketing practice that violates R.C. 4928.10 and O.A.C. 4901:1-21-03(A).

Importantly, the issue in this proceeding is a matter of first impression for the PUCO. Although Case No. 12-1924 focused on whether use of the same brand name was unfair, misleading or deceptive (it is), the issue in this case and in the Audit Report is whether the use of the FirstEnergy name violates corporate separation standards, namely O.A.C. 4901:1-37-04(D)(7).[22] That section prohibits the electric utility from endorsing any marketer 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 must be noted that the precedent for permitting utility 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 PUCO reasoned that to require the affiliated supplier to change its name would result in customer confusion.[23]

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[22] 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.

[23] 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").

Here, however, FirstEnergy Advisors has yet to commence service. Requiring it to operate under a different name not linked to FirstEnergy will not confuse customers. Indeed, as the Auditor concluded, it will eliminate confusion for customers who may be misled into believing they are being served by their regulated utility. It is imperative to require the name change before service begins.

Finally, FirstEnergy Advisors raises the worn argument that preventing it from using the FirstEnergy name will infringe upon constitutionally protected commercial speech. The FirstEnergy Utilities raised this same argument in Case No. 04-48, which the PUCO rejected, finding:

> Government may regulate commercial speech in ways that it may not regulate protected noncommercial speech, and may ensure that commercial speech is not false, deceptive, misleading, or coercive. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), 425 U.S. 748, at 770-772; *City of Cincinnati v. Discovery Network* (1993), 507 U.S. 410, 410; and *Ohralik v. Ohio State Bar Assn.* (1978), 436 U.S. 447, 457. Commercial speech is not protected by the First Amendment when it does not concern a lawful activity and is misleading. *Discovery Network, supra* at 434, explaining the right to commercial free speech addressed in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n* (1980), 447 U.S. 557. [*Id.* at 9.]

## V. Conclusion

The Consumer Groups appreciate that the PUCO suspended FirstEnergy Advisors' application. Upon the PUCO's further review of the Application, the PUCO should deny this Application unless Suvon (1) changes its managers and officers so that they do not overlap with the Regulated Utility's directors and officers, (2) agrees not to conduct business in Ohio under the "FirstEnergy" name and (3) changes the affiliate's physical headquarters so that it is not housed in the same offices as personnel of the FirstEnergy Utilities at 76 South Main Street, Akron, Ohio. Alternatively, the PUCO should conduct a hearing with a schedule that provides ample opportunity to conduct discovery.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

In accordance with O.A.C. 4901-1-05, 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 *Reply* was served on the persons stated below via electronic transmission this 25th day of February 2020.

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

Summary: Text NOPEC-OCC Reply To FirstEnergy Advisors' Memorandum Contra The NOPEC-OCC Motions To Suspend The Certification Application and For A Hearing electronically filed by Teresa Orahood on behalf of Glenn S. Krassen

**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 Services in the State of Ohio. | ) ) ) ) | Case No. 20-103-EL-AGG |

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**RESPONSE TO SUPPLEMENTED APPLICATION AND STAFF RECOMMENDATION**
**BY**
**NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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## I. Introduction

The Northeast Ohio Public Energy Council ("NOPEC") requested that this certification application be suspended, set for hearing, and denied on February 10, 2020.[1] NOPEC made its request because Suvon LLC d/b/a FirstEnergy Advisors ("FirstEnergy Advisors") will be managed and controlled by the same senior officer management team that controls the FirstEnergy Ohio electric distribution utilities ("EDUs") and housed in the same offices as the EDUs. [2] FirstEnergy Advisors' management structure as proposed in this application is a ***per se*** violation of R.C. 4928.17(A), which requires that a competitive retail electric service ("CRES") provider be a "fully separated" affiliate of its regulated utilities. The shared management and EDU control structure also will result in an abuse of market power, because FirstEnergy Advisors will receive a preferential benefit by its managers' instantaneous knowledge of the EDUs' business plans and the EDUs' market information. The corporate structure proposed in this application also violates R.C. 4928.02(I).

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[1] NOPEC made its request jointly with the Office of the Ohio Consumers' Counsel ("OCC"). See, also, NOPEC-OCC Memorandum Contra filed February 25, 2020. NOPEC's and OCC's individual motions to intervene, filed February 10, 2020, are unopposed.

[2] The Ohio EDUs are The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company.

PUCO Staff acted quickly and suspended the application on February 11, 2020, finding that NOPEC, OCC and Vistra Energy Corp. ("Vistra")[3] had demonstrated "good cause" for the suspension. Subsequently, five (5) additional parties filed motions to intervene in this case and all eight (8) intervenors unanimously requested that this application be investigated, set for hearing and/or denied. On April 1, 2020, FirstEnergy Advisors "supplemented" Exhibits B-2 (Experience and Plans) and Exhibit B-3 (Summary of Experience) to the application by way of window dressing to attempt to show that it was compliant with the PUCO's corporate separation rules. FirstEnergy Advisors' supplement, however, utterly failed to address the central question in this proceeding, namely: How can the same individuals who control the regulated EDUs and their non-regulated affiliate located in the same offices separate their knowledge of the EDUs' business plans and market information from the business plans and operations of the affiliate? The answer is clear. They cannot. It's impossible. It's a ***per se*** violation of R.C. 4928.17(A).

Unfortunately, PUCO Staff recommended that the application be approved on April 7, 2020, and failed to address the key central corporate separation issues in this case. Moreover, the Staff did not recommend that a hearing be held to provide for public input into these critical issues of great significance to the operation of open retail electricity markets in Ohio. These central corporate separate issues have been festering for a number of years before the PUCO, culminating in the first independent audit of the FirstEnergy EDUs' corporate separation plan in the 17 years since Ohio electric markets were opened. On May 14, 2018,[4] the SAGE Management Report was issued. This independent Audit Report roundly criticized the FirstEnergy EDUs co-mingling senior officers of regulated and non-regulated affiliates as violating the EDUs' corporate

[3] Vistra filed a motion to intervene and to deny or suspend the application on February 11, 2020. Vistra's motion to intervene is also unopposed.

[4] 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").

separation plan. It also criticized the use of the "FirstEnergy" name by the EDUs' non-regulated affiliate as violating the EDUs' corporate separation plan. Staff's recommendation effectively ignores the continuation of the FirstEnergy EDUs' corporate separation abuses that were specifically called out by the independent auditor. Moreover, Staff's recommendation is even much worse because it tacitly permits FirstEnergy's regulated and nonregulated affiliates to share the ***same*** senior management and to allow that EDU's senior management to operate and control the competitive affiliate. Staff and the PUCO are well aware of the intense interest in this proceeding from nearly all facets of the Ohio retail electric industry and unanimous opposition to this application by all eight (8) intervenors in this case.[5] NOPEC expected more from Staff than a rubber stamp approval of a highly controversial application without requiring a hearing or comment procedure to allow public input into this key case affecting Ohio's deregulated electric market. This is particularly disturbing since there has been no transparency from the applicant. FirstEnergy Advisors has refused to answer any discovery requests from any party in this case, including refusing to provide any communications and data requests from Staff. NOPEC is alarmed that Staff did not address why FirstEnergy Advisors should be permitted to continue these same, lingering corporate separation violations. Staff's report lacks transparency and the type of detailed review that is called for in this contested proceeding.

NOPEC, OCC and Vistra already demonstrated why FirstEnergy Advisors' application should be suspended for failing to meet the standards of R.C. 4928.08 and O.A.C. 4901:1-24-10(C). Staff found good cause to do so. FirstEnergy Advisors' superficial supplement to its exhibits does absolutely nothing to change the legal deficiencies in its application. For this reason, NOPEC hereby responds to FirstEnergy Advisors' irrelevant supplemented exhibits, as well as

[5] The intervenors 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.

Staff's reliance on them to change its recommendation in this proceeding. NOPEC urges the PUCO to reject Staff's recommendation and either (1) deny FirstEnergy Advisors' application for failing to propose a management team capable of operating the company without violating Ohio's corporate separation laws, or (2) provide intervenors and the public with due process in this proceeding by ordering the hearing warranted by O.A.C. 4901:1-24-10(A)(2)(c).[6]

## II. FirstEnergy Advisors' supplemented exhibits failed to address the central question of whether the PUCO's corporate separation rules are violated if a CRES provider is managed and controlled by the same individuals that control its affiliated EDUs.

FirstEnergy Advisors' supplemented exhibits fail to show 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. FirstEnergy Advisors' supplemental information merely repeats the meager descriptions contained in the EDUs' corporate separation plan[7] as it relates to employees. That EDU corporate separation plan is subject to a pending independent audit of the FirstEnergy EDUs that found important structural violations in their current separation plan. The applicant's added information attempts to explain (1) that shared services (through FirstEnergy Service Company) will be allocated to the cost allocation manual, (2) that sales and "customer-facing" employees will not have access to regulated distribution and transmission information, (3) that FirstEnergy Advisors is incapable of receiving preferential treatment from the EDUs, and (4) that its proposed marketing/advertising disclaimer will ensure that customers know it is separate from other FirstEnergy affiliates, even though it shares the same name. These explanations fail to address

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[6] To date, FirstEnergy Advisors has refused to provide any answers whatsoever in response to NOPEC's discovery requests, including providing its responses to any Staff data requests. As a result, NOPEC has been forced to file a motion to compel discovery (which is pending), as well as a public records request with the PUCO to obtain this information, considering that Staff is exempt from discovery.

[7] Significantly, the plan remains under investigation. The unresolved deficiencies the independent auditor identified in the plan were the impetus for the mass intervention in this proceeding.

how the EDUs' senior executives prevent sharing regulated information with themselves, considering they also form the same management team of the supposedly structurally separated affiliate housed in the same offices as the EDUs. The following are two examples[8] of how the shared management and control structure proposed in this application presents clear opportunities for abuses of the corporate separation rules, and illustrate how the words in applicant's supplement are meaningless to protect Ohio competitive retail electric markets.

1. Consider a developer who approaches one of the EDUs about a new project – a major manufacturing facility or a new subdivision of homes – and needs to arrange for regulated transmission or distribution services. Certainly, some or all of the following EDU executives will know of the proposed major development: Chuck Jones, President of FirstEnergy Utilities and a director of each of the EDUs; Steve Strah, Senior Vice President/CFO of FirstEnergy Corp and a director of each of the EDUs; and Dennis Chack, President of FirstEnergy Ohio Utilities. Conveniently, all three EDU officers also are the managers who control FirstEnergy Advisors, and Mr. Chack is its President. While learning of the proposed EDU development, they simultaneously will learn of the opportunity for their non-regulated affiliate, FirstEnergy Advisors, to make a brokerage fee by arranging for the development's power supply, before any other non-affiliated CRES provider in Ohio has knowledge.

2. Consider an EDU employee or officer who meets with an elected official of a community in the EDU's service territories in a government relations context. The community has an existing or is considering a new governmental aggregation program in its community. What in this supplemental FirstEnergy Advisors' filing prevents the EDU employee or officer from suggesting to the elected official that he or she contact a FirstEnergy Advisors employee or officer who can provide aggregation service to the community, or even introduce them? Or to walk down the hallway at the same 76 South Main Street, Akron offices the EDUs and FirstEnergy Advisors are sharing and mention the business opportunity to the FirstEnergy Advisors' employee or officer since that represents a potential fee for FirstEnergy Advisors? This is not a legally separated EDU affiliate because it cannot be if the same people are running both companies with the same profit motive.

[8] Of course, discovery and hearing are the tools to learn the affiliates' actual practices and the extent of the shared management structure's violation of the corporate separation rules.

### A. Allocating shared services to the cost allocation manual will not prevent market power abuses and cross-subsidization.

FirstEnergy Advisors offers an utterly irrelevant explanation of how shared services are allocated to attempt to rebut intervenors' claims that approval of the application will lead to cross subsidization and market power abuses. To be clear, NOPEC's concern with this application is not that a human resources employee will record her time on the wrong books, as FirstEnergy Advisors' supplement presumes. Rather, the extreme danger is that, by virtue of having the same management and control team, FirstEnergy Advisors will have knowledge of the EDUs' business plans, and have the opportunity to solicit and win new customers before its competitors, as described in the two examples above. Thus, by being in a position of control over the EDUs and FirstEnergy Advisors at the same times, the common management team is able to subsidize the operations of FirstEnergy Advisors with new business it is aware of in the EDU service territories. That violates R.C. 4928.02(H)[9] and 4928.17(A)(2) ***per se***. [10]

More importantly, the management and control structure represents a textbook classic example of market power abuse. The common management, wearing their EDU hats, represents the monopoly provider of distribution and transmission services. New customers must come to them to establish service, and existing EDU customers and communities all have EDU service or government relations representatives assigned to them. It's an abuse of that monopoly market power when the same EDU management team, wearing their FirstEnergy Advisors' CRES hats, can be the first to learn of the prospective new EDU customers or of the needs of existing EDU

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[9] It is the policy of the state to:

> (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa…

See, also, O.A.C. 4901:1-37-04(A)(3) and 4901:1-37-04(D)(6).

[10] R.C. 4928.17(A) requires corporate separation plans to comply with R.C. 4928.02, and R.C. 4928.17(A)(2) specifically requires that that plan prevent "unfair competitive advantage."

customers and the first to solicit them to arrange their power supply. That violates R.C. 4928.02(I)[11] and 4928.17A)(1).[12]

**B. Limiting distribution and transmission information to sales employees makes no difference when the persons controlling FirstEnergy Advisors possess insider knowledge of the EDUs' operations and the prohibited information.**

O.A.C. 4901:1-37-04(D)(3) prohibits CRES employees from having access to any information about the EDUs' transmission and distribution system that is not "contemporaneously available" to nonaffiliated CRES providers. FirstEnergy Advisors suggests that its application complies with the prohibition because its salespersons and "customer-facing" employees do not have physical or electronic access to this EDU information. As the two examples above show, FirstEnergy Advisors will have instantaneous knowledge of the EDUs' plans to extend distribution and/or transmission plant to serve a major new development, or community elected officials' intentions to establish or change governmental aggregation in their communities, because their management is one and the same. Because of this common management and control, it is impossible for the EDUs to share this information contemporaneously with the FirstEnergy Advisors and its nonaffiliated CRES competitors. FirstEnergy Advisors' management structure *ab initio* violates O.A.C. 4901:1-37-04(D)(3).

**C. FirstEnergy Advisors will receive preferential treatment from the EDUs.**

R.C. 4928.17(A)(3) prohibits an EDU from extending "any undue preference or advantage to any affiliate…including, but not limited to…customer and marketing information." FirstEnergy Advisors asserts that the EDUs control access to the EDUs' information and, thus, FirstEnergy

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[11] It is the policy of the state to:

> (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power.

[12] R.C. 4928.17(A) requires corporate separation plans to comply with R.C. 4928.02, and R.C. 4928.17(A)(2) specifically requires that that plan prevent "the abuse of market power." See, also, O.A.C. 4901:1-37-04(D)(8).

Advisors cannot control the information the EDUs gives to it or other CRES providers. FirstEnergy Advisors completely ignores the point being made by intervenors in this case. Using the examples above, each time the EDU develops plans to serve a new or expanding customer, or meets with an existing EDU customer community leader, FirstEnergy Advisors also learns of a sales opportunity, because the management of the two is identical. FirstEnergy Advisors receives preferential treatment by learning of this sales opportunity before its unaffiliated CRES competitors.

### D. FirstEnergy's proposed "disclaimer" that it is a separate affiliate actually is an advertisement that it is a part of the FirstEnergy family.

The independent Audit Report found that the widespread use of the "FirstEnergy" name connotes to customers that CRES affiliates are a part of the same FirstEnergy family that has been providing "trusted utility service" for years. The natural result of this branding is that customers will give greater consideration to the FirstEnergy affiliate in making their decisions about which supplier to choose. Audit Report, at 98. The Audit Report concluded that use of the "FirstEnergy" name violated the corporate separation plan, which parrots Ohio Admin. Code 4901:1-37-04(D)(7), which provides:

> (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 concluded that by virtue of using the "FirstEnergy" name, it is impossible for the regulated utilities' representatives ***not*** to "indicate" that the CRES provider 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 CRES affiliate over other CRES providers. *Id.*

FirstEnergy Advisors attempts to escape the auditor's conclusion by proposing the following "disclaimer" on all marketing and advertising materials:

> 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 address 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.

This is precisely what the auditor criticized. 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. This disclaimer is merely window dressing for the patently illegal corporate and operational structure being proposed in this application.

## III. The Staff Recommendation must be rejected because it fails to address the central issues in this proceeding.

NOPEC is both surprised and disappointed with the lack of transparency and detailed review in Staff's report issued April 7, 2020. When this application was suspended on February 11, 2020, Staff apparently recognized NOPEC's (and other intervenors') grave concerns about FirstEnergy Advisors' management arrangement, and used those concerns as the basis for its "good cause" determination to suspend the application. These problems echoed those expressed by the independent auditor in the Audit Report. However, this application presents much more severe and dangerous concerns because it does not only involve sharing a single, senior officer (as criticized in the Audit Report), but involves the entire management team that controls both FirstEnergy Advisors ***and*** the EDUs, who are largely the same. In the interim period between the Staff's suspension and its recommendation to approve the application, the only additional information provided on the public record was FirstEnergy Advisors' supplementation of Exhibits B-2 and B-3.[13] As shown above, that supplement does not even remotely address the overwhelming illegality raised with the shared management structure proposed in this application. In fact, the two examples NOPEC offers shows that the proposed shared FirstEnergy EDU/FirstEnergy Advisors' management arrangement will not prevent, but actually could promote (1) the EDUs' subsidization of FirstEnergy Advisors' business development efforts, (2) the use of the EDUs' market power to drive business to its affiliate, and (3) the EDUs' preferential treatment of FirstEnergy Advisors by providing it information before any other unaffiliated CRES provider. And, to boot, this application is neatly wrapped in a package the independent Audit Report has already flagged as violating the EDUs' corporate separation plan.

[13] As stated previously, FirstEnergy Advisors has refused to provide any answers whatsoever in response to NOPEC's discovery requests, including providing its responses to any Staff data requests. As a result, NOPEC has been forced to file a motion to compel discovery (which is pending), as well as a public records request with the PUCO to obtain any responses to data requests, considering that Staff is exempt from discovery.

The Staff Recommendation failed to address any of these obvious, critically important and persistent legal issues pending at the PUCO, or others that would be developed through meaningful discovery. Instead, Staff merely noted that FirstEnergy Advisors (eventually) completed all exhibits; Staff reviewed them, and now (for reasons not stated or made known to the public in the record of this proceeding) recommends approval. The Staff Report adds that FirstEnergy Advisors "intends" to comply with all PUCO rules. Many of the intervenors in this case have fresh memories of the EDUs' nearly successful attempt to abuse their market power by attempting to make captive customers pay for FirstEnergy Solution's uncompetitive generation.[14] The eight intervenors in this case deserve a full and transparent process and record to support Staff's recommendation, and to question the assumptions and information that went into that recommendation. Without such transparency and a public hearing process in this case, there can be no assurance or confidence that the FirstEnergy family will not again abuse its immense market power in Ohio, hurting Ohio consumers and threatening a healthy competitive retail electric market in this state.

## IV. Conclusion

The Staff Recommendation issued April 7, 2020, provides no transparency or detailed review as to how Staff arrived at its recommendation to approve FirstEnergy Advisors' application. Moreover, the lack of a public hearing in this case does not provide any confidence that the FirstEnergy EDUs will not be able to use their enormous market power to the detriment of consumers and competition in this state. For the foregoing reasons, NOPEC respectfully requests the PUCO to reject the Staff Recommendation. In doing so, NOPEC requests the PUCO to:

1. Deny FirstEnergy Advisors' application on the basis that the shared management arrangement violates Ohio law and the PUCO's rules identified in the pleadings in this proceeding. Without a lawful management team identified, FirstEnergy

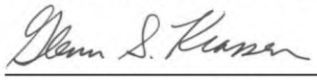
[14] See Joint Motion to Suspend at 7-8.

Advisors has not demonstrated that it has the managerial capability to provide service. R.C. 4928.08(B). FirstEnergy Advisors may submit a new application once it has identified new management that will guarantee a fully separated affiliate from the EDUs. R.C. 4928.17(A).

In the alternative, to:

2. Conduct a transparent public hearing in this proceeding that is warranted under O.A.C. 4901:1-24-10(A)(2)(c). The issues identified in this proceeding have been left unresolved by the PUCO far too long. The FirstEnergy EDUs' adherence to corporate separation rules should be fully examined, as promised in prior PUCO investigations,[15] before they have yet another opportunity to violate them with a newly certificated CRES provider.

Respectfully submitted,



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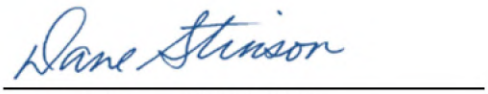
[15] *Investigation of Ohio's Retail Electric Service*, Case No. 12-3151-EL-COI, Finding and Order (March 26, 2014) at 16 (the PUCO found that "it is imperative that utility and affiliate activities undergo vigilant monitoring in order to ensure their compliance with Ohio Rev. Code 4928.17 and Ohio Adm. Code 4901:1-37, and in order to further Ohio's policies pursuant to Ohio Rev. Code 4928.02.").

## CERTIFICATE OF SERVICE

In accordance with O.A.C. 4901-1-05, 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 *Response* was served on the persons stated below via electronic transmission this 14th day of April 2020.



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Summary: Response to Supplemented Application and Staff Recommendation by Northeast Ohio Public Energy Council electronically filed by Teresa Orahood on behalf of Dane Stinson

**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 Services in the State of Ohio. | ) ) ) ) | Case No. 20-103-EL-AGG |

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# NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S APPLICATION FOR REHEARING

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## TABLE OF CONTENTS


Page

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**

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

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**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,[1] 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[2] 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.[3] 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

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[1] 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.

[2] 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.

[3] 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*.[4] 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.

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[4] 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.[5] To achieve that goal, captive monopoly consumers had to be protected against incumbent utilities' potential market power abuses.[6]

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.[7]
>
> (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

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[5] Ohio Rev. Code 4928.02(C).

[6] Ohio Rev. Code 4928.02(I).

[7] 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,[8] in the nearly 20 years since, the Commission never has undertaken a detailed review to ensure that the FirstEnergy EDUs[9] were complying with the Commission's corporate separation rules.[10] As a part of its Investigation of Ohio's Retail Electric Service Market in 2012,[11] 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."[12]

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.[13] 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.[14] The auditor also recommended that the "FirstEnergy" name be removed from FES's name, noting that "[u]sing

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[8] See Case No. 00-1742-EL-CRS.

[9] The FirstEnergy EDUs are The Cleveland Electric Illuminating Company, The Ohio Edison Company, and Ohio Edison Company.

[10] See Joint Motion to Suspend this application filed February 10, 2020 ("Joint Motion") at 6-7.

[11] See Case No. 12-3151-EL-COI, Finding and Order (March 26, 2014) ("*Market Investigation*").

[12] *Id.* at 16.

[13] 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.

[14] 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."[15] The Auditor's recommendation was intended to "eliminate affiliate bias."[16]

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

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[15] Audit Report at 98; see, also, O.A.C. 4901:1-37-04(D)(7).

[16] 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.[17] 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[18]], 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

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

[18] 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."[19]

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**

[19] 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."[20]

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.

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[20] 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.[21] 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

[21] *Id.*, Verde's memorandum contra OCC's motion to compel (January 10, 2020).

schedule or hearing.[22] 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) 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.

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[22] *Id.*, ¶ 13.

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[23] | FirstEnergy Advisors[24] | Regulated Utilities[25] |
| Charles Jones, CEO, Pres FE Utilities (FEC) | Charles Jones, Manager | Charles Jones Director |
| D.M. Chack, Pres. FE Ohio Utilities (FEC) Sr. VP Mkting/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:

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[23] See firstenergycorp.com/investor/corporate_governance/officers_and_directors.html; investors.firstenergy.com

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

[25] 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),[26] 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

[26] 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).[27] 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.[28] 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:

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[27] 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.

[28] 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,

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**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 22nd day of May 2020, electronic transmission.

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**ATTACHMENT C - PART 1**

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| In re the Application of Suvon, LLC d/b/a/ FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio. | ) ) ) ) ) | Supreme Court Case No. 2020-1009<br>On Appeal from the Public Utilities Commission of Ohio<br>PUCO Case No. 20-103-EL-AGG |

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## TABLE OF CONTENTS

Page

TABLE OF CONTENTS....1

TABLE OF AUTHORITIES....v

I. INTRODUCTION....1

II. STATEMENT OF FACTS AND THE CASE....3

III. STANDARD OF REVIEW....8

IV. LAW AND ARGUMENT....9

**PROPOSITION OF LAW NO. 1: IT IS UNLAWFUL FOR THE COMMISSION TO GRANT A CERTIFICATE APPLICATION UNDER O.A.C. 4901:1-24-10(C) WITHOUT MAKING AN AFFIRMATIVE FINDING THAT THE APPLICANT IS FIT AND CAPABLE OF COMPLYING WITH THE COMMISSSION'S RULES. O.A.C. 4901:1-24-10(C)(2).....10**

**PROPOSITION OF LAW NO. 2: WHEN THE COMMISSION FAILS TO MAKE THE AFFIRMATIVE FINDINGS REQUIRED BY O.A.C. 4901:1-24-10(C), IT NECESSARILY VIOLATES R.C. 4903.09, BY FAILING TO MAKE FINDINGS TO SUPPORT ITS DECISION IN A CONTESTED CASE.....12**

A. The Commission made no findings that FirstEnergy Advisors was compliant with O.A.C. 4901:1-24-10(C)(2).....12

B. The Commission's adoption of Staff's conclusory recommendation that FirstEnergy Advisors' management is fit and capable to provide service under O.A.C. 4901:1-24-10(C)(1) does not satisfy R.C. 4903.09.....13

1. NOPEC strenuously objected to Staff's recommendation.....13

1. The Commission's reliance on Staff's meager and conclusory analysis is insufficient to satisfy the requirements of R.C. 4903.09.....14

**PROPOSITION OF LAW NO. 3: IT IS UNLAWFUL FOR THE COMMISSON TO SHIFT THE BURDEN OF PROOF FROM THE APPLICANT IN CERTIFICATION PROCEEDINGS BY REQUIRING INTERVENING PARTIES TO SHOW WHY THE APPLICATION SHOULD NOT BE GRANTED.....16**

A. It is unlawful for the Commission to approve a certification application on the basis that the intervenors had not "materially disputed" its Staff's determination, when the Commission unlawfully denied intervenors their statutory right to discovery under R.C. 4903.082 and O.A.C. 4901-1-17(A).....16

1. An intervenor's discovery rights attach when it files its motion to intervene.....18

2. The Commission is mistaken that the 90-day approval process made it necessary to ignore NOPEC's lawful discovery rights.....19

**PROPOSITION OF LAW NO. 4: WHEN THE COMMISSION UNLAWFULLY DENIES A PARTY ITS STATUTORY RIGHT TO DISCOVERY, IT IS UNJUST AND UNREASONABLE TO REQUIRE THAT PARTY TO SHOW PREJUDICE BY THE COMMISSION'S ORDER. .....21**

**PROPOSITION OF LAW NO. 5. THE COMMISSION ABUSED ITS DISCRETION NOT TO HOLD A HEARING IN THIS CASE WHEN NOPEC PROVIDED GOOD CAUSE THAT FIRSTENERGY ADVISORS WAS VIOLATING THE CODE OF CONDUCT, AND THE COMMISSION RECOGNIZED GOOD CAUSE BY DEFERRING THAT ISSUE TO ANOTHER CASE. .....22**

CERTIFICATE OF SERVICE .....27

**APPENDIX TO MERIT BRIEF**

**Page**

**NOTICES, ORDERS, ENTRIES AND PLEADINGS**

*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,* PUCO Case No. 20-103-EL-AGG Finding and Order (April 22, 2020).....001

*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,* PUCO Case No. 20-103-EL-AGGApplication for Rehearing by The Northeast Public Energy Council(May 22, 2020).....011

*In the Matter of the Application of Suvon, LLC d/b/a FirstEnergyAdvisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio,* PUCO Case No. 20-103-EL-AGGEntry on Rehearing (June 17, 2020).....036

*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,* PUCO Case No. 20-103-EL-AGGAttorney Examiner Entry (February 11, 2020).....052

*In the Matter of the Application of Energy Harbor LLC for Certification as a Competitive Retail Electric Service Provider* PUCO Case No. 00-1742-EL-CRS Finding and Order (May 6, 2020).....055

**INDEX**

**Page**

*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 Adm. Code Chapter 4901:1-37,* PUCO Case No. 17-974-EL-UNC Attorney Examiner Entry (April 29, 2020) ..... 062

*In the Matter of the Review of Ohio Edison Company, The Cleveland ElectricIlluminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37,* PUCO Case No. 17-974-EL-UNCAudit Report (May 14, 2018) ..... 067

*In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings during the Declared State of Emergency and Related Matters,* PUCO Case No. 20-591-AU-UNC Attorney Examiner Entry (March 16, 2020) ..... 208

*In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings during the Declared State of Emergency and Related Matters,* PUCO Case No. 20-591-AU-UNC Attorney Examiner Entry (May 20, 2020) ..... 213

*In re Cincinnati Gas & Elec. Col. V. City of Lebanon,* Case No. 05-103-EL-PWC Entry (February 8, 2005) ..... 217

*In re Cleveland Elec. Illum. Co. et al.,* PUCO Case No. 07-385-EL-PWC Entry (April 17, 2007) ..... 220

*In re Dayton Power & Light Co.,* PUCO Case No. 88-1047-EL-UNC Entry (September 12, 1988) ..... 224

*In re Columbia Gas of Ohio,* PUCO Case No. 11-5351-GA-UNC Entry (January 27, 2012) ..... 228

*In re Verde USA Ohio, LLC,* PUCO Case No. 11-5886-EL-CRS Entry (March 3, 2020) ..... 232

## INDEX

**Page**

**OHIO REVISED CODE**

R.C. 4903.082 ....239

R.C. 4903.09 ....240

R.C. 4903.13 ....241

R.C. 4905.26 ....242

R.C. 4928.02 ....243

R.C. 4928.08 ....245

R.C. 4928.17 ....246

R.C. 4928.20 ....248

R.C. 4929.02 ....251

**REGULATIONS**

Ohio Adm. Code 4901:1-24-10 ....252

Ohio Adm. Code 4901:1-27-10 ....253

Ohio Adm. Code 4901:1-37-02 ....254

Ohio Adm. Code 4901:1-37-04 ....255

Ohio Adm. Code 4901-1-12 ....258

Ohio Adm. Code 4901-1-16 ....260

Ohio Adm. Code 4901-1-17 ....262

Ohio Adm. Code 4901-1-19 ....263

Ohio Adm. Code 4901-1-20 ....264

## TABLE OF AUTHORITIES

Page

**CASES**

*Cleveland Electric Illuminating Co. v. Pub. Util. Comm.,* 76 Ohio St.3d 521, 668 N.E.2d 889 (1996) ..... 11

*Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 388 N.E.2d 1237 ..... 10, 23

*Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 447 N.E.2d 733 .. 10, 23

*Ideal Transp. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 195, 326 N.E.2d 861 ..... 18

*In re Cincinnati Gas & Elec. Co. v. City of Lebanon*, Case No. 05-103-EL-PWC, Entry (February 8, 2005) ..... 21

*In re Cleveland Elec. Illum. Co. et al*., Case No. 07-385-EL-PWC, Entry April 17, 2007 ..... 22

*In re Columbia Gas of Ohio*, Case No. 11-5351-GA-UNC, Entry January 12, 2012 ..... 22

*In re Dayton Power & Light Co*., Case No. 88-1047-EL-UNC, Entry September 12, 1988 ..... 22

*In Re Energy Harbor LLC*, PUCO Case No. 00-1742-EL-CRS, 2020 WL 2425762, Finding and Order (May 6, 2020) ..... 5

*In Re Ohio Edison Company*, 157 Ohio St. 3d 73, 2019-Ohio-2401, 131 N.E.3d 906 ..... 4

*In re Review of Ohio Edison Company, et al.,* Pub. Util. Comm. No. 17-974-EL-UNC ..... 2

*In re Verde USA Ohio, LLC*, Case Nos. 11-5886-EL-CRES et al., Entry (March 3, 2020) ..... 22

*In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings during the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC (March 16, 2020) ..... 7

*Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.,* 68 Ohio St.3d 559, 629 N.E.2d 423 (1994)..... 11

*Office of Consumers' Counsel v. Pub. Util. Comm.,* 58 Ohio St.2d 108, 388 N.E.2d 1370 (1979)..... 10

*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*, Case No. 17-974-EL-UNC (May 14, 2018)..... 3, 26, 28, 29

*Tongren v. Pub. Util. Comm*., 85 Ohio St.3d 87, 708 N.E.2d 1255 (1999)..... 17

*Village of Grafton v. Ohio Edison,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996) ..... 10

**STATUTES**

148 Ohio Laws, Part IV, 796 ..... 11

R.C. 4903.082 ..... 4, 19

R.C. 4903.09 ..... passim

R.C. 4903.13 ..... 10

R.C. 4905.26 ..... 21

R.C. 4928.02(H)(1) ..... 11

R.C. 4928.08 ..... 23

R.C. 4928.08(B) ..... 4, 7, 23, 24

R.C. 4928.17 ..... 11, 25

R.C. 4928.17(A) ..... 1, 6, 28

R.C. 4928.20 ..... 3

R.C. 4929.02 ..... 25

R.C. Chapter 167 ..... 3

**TREATISES**

Ohio Adm.Code 4901:1-23-10(C) ..... 25

Ohio Adm.Code 4901:1-24-10(A)(1) ..... 8, 12

Ohio Adm.Code 4901:1-24-10(A)(2)(b) ..... 12, 21

Ohio Adm.Code 4901:1-24-10(A)(2)(c) ..... 4, 26

Ohio Adm.Code 4901:1-24-10(C) ..... 2, 4, 18, 29

Ohio Adm.Code 4901:1-24-10(C)(1) ..... 14

Ohio Adm.Code 4901:1-24-10(C)(1) ..... passim

Ohio Adm.Code 4901:1-24-10(C)(2) ..... passim

Ohio Adm.Code 4901:1-37-02(B) ..... 1, 11

Ohio Adm.Code 4901:1-37-04(D) ..... 1, 5, 6, 11

Ohio Adm.Code 4901:1-37-04(D)(2) ..... 12

Ohio Adm.Code 4901:1-37-04(D)(3) ..... passim

Ohio Adm.Code 4901:1-37-04(D)(7) ..... 6, 12, 15, 25

Ohio Adm.Code 4901-1-12 ..... 24

Ohio Adm.Code 4901-1-16(H) ..... 19

Ohio Adm.Code 4901-1-17 ..... 21

Ohio Adm.Code 4901-1-17(A) ..... 4, 20

Ohio Adm.Code 4901-1-19 ..... 20

Ohio Adm.Code 4901-1-20 ..... 20

Ohio Adm.Code. 4901:1-37-04(A) ..... 1, 6, 11, 28

## I. INTRODUCTION

This case is about the need for transparency in approving an application to provide competitive retail electric service ("CRES"), when the applicant is an affiliate of a monopoly electric distribution utility ("EDU"). Suvon, LLC d/b/a FirstEnergy Advisors ("FirstEnergy Advisors") is a subsidiary of FirstEnergy Corp ("FEC") and an affiliate of the FirstEnergy EDUs.[1] FirstEnergy Advisors filed an application with the Public Utilities Commission of Ohio ("Commission") on January 17, 2020, to provide CRES as a power broker and aggregator. (R. 1.) The Commission's rules require an applicant for CRES authority to show that its management is fit and capable to provide service (O.A.C. 4901:1-24-10(C)(2)) and, also, that it is fit and capable of complying with the Commission's rules (O.A.C. 4901:1-24-10(C)(1)), especially the Code of Conduct. O.A.C. 4901:1-37-04(D). The Code of Conduct is meant to *prevent* the EDU from committing market power abuses through its affiliate CRES relationships and, thus, requires an EDU's CRES affiliate to provide service as a "fully separate affiliate." See R.C. 4928.17(A), O.A.C. 4901:1-37-02(B), and O.A.C. 4901:1-37-04(A) and (D). The Commission must make the affirmative findings required by O.A.C. 4901:1-24-10(C) before approving a CRES application.

The Commission refused to make these findings, but yet approved FirstEnergy Advisors' application by Finding and Order issued April 22, 2020 (the "Order"). (R. 43; NOPEC Appx. at 001.) Instead of making these findings in this case, as required, the Commission deferred consideration of the Code of Conduct violations to a separate pending proceeding, *In re Review*

[1] FEC is the parent holding company of The Cleveland Electric Illuminating Company ("CEI"), The Toledo Edison Company ("TE") and Ohio Edison Company ("OE") (collectively, the "FirstEnergy EDUs"), which are monopoly, electric distribution companies in Ohio. FEC formerly was the parent of FirstEnergy Solutions ("FES"), the affiliate that provided competitive generation service in the wholesale market using the EDUs' formerly regulated legacy generating plants.

*of Ohio Edison Company, et al.,* Pub. Util. Comm. No. 17-974-EL-UNC (the "Audit Case"). See Order (R. 43) at 6 (NOPEC Appx. at 006.) The Code of Conduct violations are severe:

1. FEC senior officials who manage and control the FirstEnergy EDUs also manage and control FirstEnergy Advisors. By co-mingling senior officers and directors, FirstEnergy Advisors necessarily receives non-public information about the EDUs' operations that FirstEnergy Advisors' competitors do not have.

2. Suvon, LLC is permitted to use the "FirstEnergy" trade name, which blurs the distinction between customers' long-standing relationship with the FirstEnergy EDUs and the EDUs' CRES, which is supposed to provide service as a "fully separate affiliate."

The Commission should have resolved these issues in this proceeding, through hearing, before granting FirstEnergy Advisors permission to provide service. As it stands, FirstEnergy Advisors has been operating in Ohio since April 22, 2020, Order (R. 43.) with the Commission's full knowledge that it is doing so with distinct, unfair and unlawful advantages over its competitors, including Appellant Northeast Ohio Public Energy Council ("NOPEC"). Indeed, in the Audit Case, an independent auditor gave fair warning of these abuses by criticizing the sharing of even a single officer[2] and finding that use of the "FirstEnergy" name violated the Code of Conduct.[3]

Appellant NOPEC is a regional council of governments established under R.C. Chapter 167, and is the largest governmental retail energy aggregator certified by the Commission to operate in Ohio. R.C. 4928.20. NOPEC serves approximately 500,000 electric aggregation customers in more than 235 member communities in 19 Ohio counties, primarily in the CEI and OE service territories. NOPEC Motion to Intervene (February 10, 2020) (R. 2) at 2-3.) As a

[2] See Audit Case, 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 34, 39. (NOPEC Appx. at 102, 107.)
[3] *Id.* at 46, 96-98. (NOPEC Appx. at 114, 165-167.)

governmental aggregator, NOPEC must compete with FirstEnergy Advisors to serve local communities by aggregating their residents' electric load. By permitting FirstEnergy Advisors to compete using the FirstEnergy EDUs' management team and trade name, the Commission's order creates the unlevel, and unlawful, playing field that the Code of Conduct is intended to prevent.

NOPEC asks this Court to reverse the Commission's Order approving FirstEnergy Advisors' certificate and to remand this case to the Commission in order for it to conduct a hearing and make findings as to whether FirstEnergy Advisors meets the requirements of O.A.C. 4901:1-24-10(C). The Commission's Order is unlawful because:

1. The Commission failed to make the findings required by R.C. 4928.08(B) and O.A.C. 4901:1-24-10(C)(1) and (2) before granting FirstEnergy Advisors' application to provide CRES in Ohio. O.A.C. 4901:1-24-10(C).
2. The Commission failed to make findings of fact to support its decision. R.C. 4903.09.
3. The Commission shifted the burden of proof in this proceeding from the applicant to NOPEC and the other intervenors. R.C. 4928.08(B) and 4901:1-24-10(C) ).
4. The Commission denied NOPEC's statutory right to conduct discovery. R.C. 4903.082 and O.A.C. 4901-1-17(A).
5. The Commission abused its discretion by not holding a hearing in this case. O.A.C. 4901:1-24-10(A)(2)(c).

## II. STATEMENT OF FACTS AND THE CASE

The history of this proceeding actually is a continuation of the saga of former FEC affiliate FES's failure to compete successfully in the wholesale electric marketplace. See *In Re Ohio Edison Company*, 157 Ohio St. 3d 73, 2019-Ohio-2401, 131 N.E.3d 906. FES eventually filed a voluntary Chapter 11 petition for bankruptcy. After passage of controversial Ohio House

Bill 6,[4] which generally subsidizes FES's legacy nuclear plants, FES emerged from bankruptcy as Energy Harbor LLC on February 27, 2020. Energy Harbor is no longer a subsidiary of FEC or affiliated with the FirstEnergy EDUs. See *In Re Energy Harbor LLC*, PUCO Case No. 00-1742-EL-CRS, 2020 WL 2425762, Finding and Order (May 6, 2020). NOPEC Appx. at 055).

Prior to FES's emergence from bankruptcy, FEC moved key employees who operated FES's governmental aggregation line of business to FirstEnergy Advisors (Application (R.1) at Exs. A-12, B-2 and B-3; R.28 at Exs. B-2 and B-3), which then filed its certification application to provide aggregation services with the Commission on January 17, 2020. (R. 1.) Not only did FEC move the FES employees to FirstEnergy Advisors, it also moved FirstEnergy Advisors into the same building that houses the FirstEnergy EDUs' common management team, at 76 South Main Street in Akron, Ohio. (Application (R.1) at 1.)

NOPEC filed an uncontested motion to intervene in this proceeding on February 10, 2020.[5] (R. 2.) NOPEC submitted publicly available information in its pleadings showing that FirstEnergy Advisors was not compliant with the Commission's rules, specifically the Code of Conduct provisions contained in O.A.C. 4901:1-37-04(D). (R. 2, 4, 13, 20, 25, 35, 36.) The information showed that the senior management team that controls and manages the non-competitive (monopoly) FirstEnergy EDUs, also controls and manages their non-regulated competitive affiliate, FirstEnergy Advisors, in violation of (at least) O.A.C. 4901:1-37-04(D)(3). The rule prohibits FirstEnergy Advisors' employees from having access to information about the

[4] 2019 Am. Sub. H.B. No. 6.

[5] Seven other intervenors were granted intervention in this case. The intervenors represent a broad and diverse spectrum of stakeholders in Ohio's competitive retail electric services industry and include: NOPEC, the Office of the Ohio Consumers' Council ("OCC") (R. 3.), Retail Energy Supply Association (R. 19), Palmer Energy Company (R.10.), Interstate Gas Supply (R. 21.), Vistra Energy Corp. and its subsidiaries (R. 5.), the Northwest Ohio Aggregation Coalition (R. 7.), and Energy Professionals of Ohio (R. 11).

FirstEnergy EDUs' transmission and distribution systems that is not contemporaneously shared with other CRES providers. Among other shared employees, two of FirstEnergy Advisors' three managers also hold senior positions with the FirstEnergy EDUs. Chuck Jones was President of the FirstEnergy EDUs, CEO of FEC and a director of each of the FirstEnergy EDUs. Steve Strah was Senior Vice President and a director of each of the FirstEnergy EDUs. Because of the common management structure, the managers of FirstEnergy Advisors (Mr. Jones and Mr. Strah) necessarily possess non-public information about the FirstEnergy EDUs' transmission and distribution systems that is impossible to share contemporaneously with other CRES providers. (R. 2 at 3-5, R. 4 at 8-15, R. 13 at 7-10, R. 20 at 7-10, R. 36 at 1-7 and 9-11.) Indeed, the comingling of the FirstEnergy EDUs' and FirstEnergy Advisors' senior management team is so pervasive that it is impossible for FirstEnergy Advisors to "function independently" of the EDUs as required by statute and the Code of Conduct. R.C. 4928.17(A), O.A.C. 4901:1-37-04(A) and (D).

In addition, NOPEC provided information that Suvon LLC's use of the "FirstEnergy" name, which is widely marketed by the FirstEnergy EDUs, violated (at least) O.A.C. 4901:1-37-04(D)(7). The rule requires the FirstEnergy EDUs to provide its customers, upon request, a list of all CRES providers operating in their service territories. However, the rule prohibits the FirstEnergy EDUs from indicating that any CRES provider on the list is an affiliate. Suvon, LLC's use of the trade name "FirstEnergy Advisors" necessarily indicates that it is affiliated with the FirstEnergy EDUs. (R. 2 at 6, R. 4 at 15-17, R. 13 at 10-12, R. 36 at 7-11).

On the basis of this information, NOPEC (jointly with OCC) filed a motion on February 10, 2020, asking the Commission to suspend the Application and hold a hearing ("Joint Motion"). (R. 4.) The Commission's attorney examiner acted quickly to grant the Joint Motion

and suspended the Application for "good cause" the following day, by entry of February 11, 2020. (R. 6.)

NOPEC served discovery on FirstEnergy Advisors on February 20, 2020, seeking additional information regarding its common management structure with the FirstEnergy EDUs and the extent it shared employees and information with the FirstEnergy EDUs, as well as Energy Harbor f/k/a FES. NOPEC Motion to Intervene (R. 30). FirstEnergy Advisors refused to answer any of the interrogatories or requests for production of documents, including producing any requests PUCO Staff made for additional information. NOPEC Motion to Intervene (R. 30) at Att. C.

During the discovery dispute, the Commission issued emergency orders on March 16, 2020, in response to the COVID-19 pandemic gripping Ohio. See *In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings during the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC (March 16, 2020) ("Emergency Orders"). (NOPEC Appx. at 208). The Emergency Orders tolled the 90-day deadline by which the Commission must rule on applications that had been suspended pursuant to R.C. 4928.08(B) and O.A.C. 4901:1-24-10(A)(1). The effect of the Emergency Order was that it released the Commission from any time constraints that would have restricted full discovery and hearing.

While NOPEC was attempting to resolve FirstEnergy Advisors' unfounded objections to each of NOPEC's interrogatories, FirstEnergy Advisors filed a motion on March 17, 2020, for a protective order to prevent discovery in this case. (R. 18.) NOPEC filed its motion to compel on March 20, 2020. (R. 20.)

While the motions were pending, FirstEnergy Advisors filed supplemental information in this certification case on April 1, 2020. (R. 29.) Staff issued it Review and Recommendation on FirstEnergy Advisors' Application, as supplemented, on April 7, 2020. (R. 31.) Staff's complete analysis consists of the following two paragraphs:

> 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 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.

It is impossible to determine from Staff's scant and non-transparent review the bases on which it concluded that FirstEnergy Advisors' management was fit and capable of (1) providing service and (2) complying with Commission rules. Nevertheless, the Commission adopted Staff's recommendation, approved FirstEnergy Advisors' Application, denied NOPEC's motion to compel discovery as "moot," and denied public hearing. Order (R. 43) at 7. (NOPEC Appx. at 007.) Importantly, the Commission refused to address whether FirstEnergy Advisors was compliant with the Code of Conduct. Instead, it deferred ruling on compliance with the Code of Conduct to the *separate pending Audit Case* that considered defunct FES's compliance with the Code of Conduct rules. Order (R. 43) at 6. (NOPEC Appx. at 006.) The Commission went so

far as to take administrative notice in the *Audit Case* of FirstEnergy Advisors' application submitted in *this case*. Audit Case, Entry (April 29, 2020) at 3 (NOPEC Appx. at 64.

In approving FirstEnergy Advisors' certification application in this proceeding, the Commission found:

> 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 the managerial, technical and financial capability to function as a CRES power broker and aggregator in this state. Accordingly, we find that Suvon's application should be approved. We further find that no hearing is necessary. [Order (R. 43) at 7 (NOPEC Appx. at 007); Entry on Rehearing (R. 49) at 11 (NOPEC Appx. at 46.)]

By adopting Staff's unsupported recommendation, the Commission prevented the intervening parties, and this Court, from learning the basis of its decision, as required by R.C. 4903.09. Moreover, the Commission shifted the burden of proof to NOPEC and the other intervenors by requiring them to show why the Application should not be granted…even though it denied intervenors all rights to discovery and, thus, the basis to make this showing.

NOPEC timely filed its Application for Rehearing of the Finding and Order on May 22, 2020 (R. 45, NOPEC Appx. at 011.), which the Commission denied on June 17, 2020 ("Entry on Rehearing"). (R. 49; NOPEC Appx. at 036.) This appeal is properly before this Court on the issues raised by NOPEC's timely Notice of Appeal filed August 14, 2020.

## III. STANDARD OF REVIEW

R.C. 4903.13 governs this Court's review of the Commission's orders. It provides in pertinent part:

> A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable . . . .

The Court has interpreted this standard as one turning on whether the issue presents a question of law or a question of fact. The Court will not reverse or modify a Commission order as to

questions of fact where the record contains sufficient probative evidence to show that the Commission's determination is not against the manifest weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 447 N.E.2d 733; *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 388 N.E.2d 1237. As to questions of law, the Court has complete, independent power of review. *Office of Consumers' Counsel v. Pub. Util. Comm.,* 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979). This Court uses a *de novo* standard of review to decide all matters of law such as those raised in this case. *Village of Grafton v. Ohio Edison,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.,* 76 Ohio St.3d 521, 523, 668 N.E.2d 889 (1996); *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.,* 68 Ohio St.3d 559, 563, 629 N.E.2d 423 (1994).

## IV. LAW AND ARGUMENT

When the Ohio General Assembly opened Ohio's monopoly electricity market to CRES providers in 1999,[6] it recognized that EDUs have considerable market power. R.C. 4928.02(H)(1). It also recognized the potential for market power abuses if an EDU, having served captive customers for nearly a century or more, could compete directly with new market entrants to provide CRES. To prevent these potential abuses, the General Assembly required the EDU's CRES affiliates to provide service as a "*fully separated affiliate*." R.C. 4928.17, O.A.C. 4901:1-37-04(A). To enforce the statute, the Commission promulgated Code of Conduct rules. O.A.C. 4901:1-37-02(B) and 4901:1-37-04(A) and (D). As they pertain to this appeal, the rules:

> (1) prevent sharing employees, if the affiliated CRES employees have access to information about the EDU's transmission and distribution systems that is

[6] 1999 of Am. Sub. S.B. No. 3 (S.B. 3"), 148 Ohio Laws, Part IV, 796.

not available contemporaneously to the other CRES providers (O.A.C. 4901:1-37-04(D)(3)), and

(2) prevent an EDU from indicating to its customers that a CRES provider is an affiliate, when providing customers lists of CRES providers in their service territories (O.A.C. 4901:1-37-04(D)(7)).

**PROPOSITION OF LAW NO. 1: IT IS UNLAWFUL FOR THE COMMISSION TO GRANT A CERTIFICATE APPLICATION UNDER O.A.C. 4901:1-24-10(C) WITHOUT MAKING AN AFFIRMATIVE FINDING THAT THE APPLICANT IS FIT AND CAPABLE OF COMPLYING WITH THE COMMISSSION'S RULES. O.A.C. 4901:1-24-10(C)(2).**

On February 10, 2020, NOPEC and OCC filed their Joint Motion asking the Commission to suspend automatic approval of FirstEnergy Advisors' certification application and requested a hearing. (R. 2.) As stated above, NOPEC and OCC made their request citing FirstEnergy Advisors' violation of various Code of Conduct provisions, including (1) that senior officials who manage and control the FirstEnergy EDUs also manage and control FirstEnergy Advisors, in violation of O.A.C. 4901:1-37-04(D)(3), and (2) that Suvon, LLC uses the "FirstEnergy" trade name in violation of O.A.C. 4901:1-37-04(D)(7). Based upon NOPEC and OCC's Joint Motion, the Attorney Examiner found "good cause" to suspend automatic approval of the application the following day. Entry (February 11, 2020). (R. 6.)

Once an application is suspended from automatic approval under O.A.C. 4901:1-24-10(A)(1), the Commission must either approve or deny the application by written entry. O.A.C. 4901:1-24-10(A)(2)(b). In order to approve the application, the Commission must affirmatively find that FirstEnergy Advisors is "managerially, financially, and technically fit and capable to comply with all applicable commission rules and orders." [7] O.A.C. 4901:1-24-10(C)(2). The

[7] Of course, a management team is not "fit" to comply with Commission's rules if the management team itself is in violation of them, as in this case.

Commission did not make this finding in either its Order or Entry on Rehearing. (R. 43, R. 49.) Its failure to do so is unlawful and reversible error.

The Commission agrees, and it is undisputed, that FirstEnergy Advisors will share key officers and directors with its monopoly utility affiliates. The Commission even goes so far as to agree that such sharing is unlawful if it violates the Code of Conduct. Entry on Rehearing (R. 49) at 13. (NOPEC Appx. at 48.) However, the Commission refused to resolve in this proceeding whether FirstEnergy Advisors' sharing of senior officers and directors with the EDU violates the Code of Conduct. Instead, it punted this issue to the still-pending 2017 Audit Case involving a separate, defunct FirstEnergy EDU affiliate, FES. Entry on Rehearing (R. 49) at 11, 13 (NOPEC Appx. at 46, 48).

The Commission was required to decide this issue in the certification application before permitting FirstEnergy Advisors to operate. O.A.C. 4901:1-24-10(C)(2). Deciding this issue was necessary to ensure that FirstEnergy Advisors would have no advantages in the marketplace over its competitors due its affiliation with the FirstEnergy EDUs. By punting this open issue to the Audit Case, the Commission knowingly permitted FirstEnergy Advisors to provide service, without deciding whether market abuses were likely to follow, as pointed out in the independent Audit Report. That independent auditor had recommended that a single senior FES officer be transferred from an FEC subsidiary (FirstEnergy Services Company, which offers FEC affiliates back-office support and primarily serves the FirstEnergy EDUs), because the officer would necessarily be privy to the FirstEnergy EDUs' non-public information. Audit Report at 34, 39 (NOPEC Appx. at 102, 107.) That independent auditor also recommended that FES be forbidden from doing business under the "FirstEnergy" brand name. Audit Report at 46, 96-98

(NOPEC Appx. 114, 165-167.) Accordingly, the Court should reverse the Commission's Order approving FirstEnergy Advisors' certification and remand this case for hearing.

**PROPOSITION OF LAW NO. 2: WHEN THE COMMISSION FAILS TO MAKE THE AFFIRMATIVE FINDINGS REQUIRED BY O.A.C. 4901:1-24-10(C), IT NECESSARILY VIOLATES R.C. 4903.09, BY FAILING TO MAKE FINDINGS TO SUPPORT ITS DECISION IN A CONTESTED CASE.**

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.

The Commission granted all eight intervenors' motions to intervene in this proceeding. NOPEC's motion to intervene was unopposed. Thus, this is a contested case. However, the Commission made no findings that support its determination that FirstEnergy Advisors' management was (1) fit and capable of providing service (O.A.C. 4901:1-24-10(C)(1)), and (2) fit and capable to comply with Ohio law (O.A.C. 4901:1-24-10(C)(2)). On this basis alone, the Court should reverse the Commission's Order granting FirstEnergy Advisors a certificate to provide CRES and remand this case to the Commission for hearing to make the findings required by O.A.C. 4901:1-24-10(C) and R.C. 4903.09.

**A. The Commission made no findings that FirstEnergy Advisors was compliant with O.A.C. 4901:1-24-10(C)(2).**

As discussed above, the Commission made no findings or determination under 4901:1-24-10(C)(2) as to whether FirstEnergy Advisors' management was compliant with the Code of Conduct provisions set forth in O.A.C. 4901:1-37-04(D)(3) and (7). Rather, it punted that determination to the Audit Case. The Commission's failure to make the required findings under O.A.C. 4901:1-24(C)(2), before permitting FirstEnergy Advisors to operate, results in the Commission's order being unlawful under R.C. 4903.09.

### B. The Commission's adoption of Staff's conclusory recommendation that FirstEnergy Advisors' management is fit and capable to provide service under O.A.C. 4901:1-24-10(C)(1) does not satisfy R.C. 4903.09.

The Commission's determination that FirstEnergy Advisors' management was fit and capable to provide service under O.A.C. 4901:1-24-10(C)(1) also fails under R.C. 4903.09. After punting consideration of FirstEnergy Advisors' alleged Code of Conduct violations to the Audit Case, the Commission addressed whether FirstEnergy Advisors' management was fit and capable of providing service under 4901:1-24-10(C)(1). The Commission summarized its findings as follows:

> The Commission further explained [in its Order] that that *no party in this case had materially disputed* Staff's determination that Suvon had the managerial, technical and financial capability to serve as a CRES power broker and aggregator, and *the Commission adopted the recommendation filed by Staff on April 7, 2020*.

Emphasis supplied. Entry on Rehearing (R. 49) at 11 ( NOPEC Appx. at 46).

#### 1. NOPEC strenuously objected to Staff's recommendation.

The Commission is entirely mistaken that no party "materially disputed" Staff's determination.[8] The heart of NOPEC's opposition to FirstEnergy Advisors' Application was that the key officers and directors, who managed and controlled the monopoly FirstEnergy EDUs, also managed and controlled their competitive affiliate, FirstEnergy Advisors. These officers and directors should have been disqualified from managing and controlling FirstEnergy Advisors under O.A.C. 4901:1-24-10(C)(2); but, the Commission deliberately chose not to address that

[8] The Commission also found that no party alleged that Staff did not thoroughly investigate and review the Application and the supplement filed by FirstEnergy Advisors. Entry on Rehearing (R. 49) at 10 (NOPEC Appx. at 45). The Commission's finding is so unsupported by the record as to show misapprehension, mistake, and willful disregard of duty. In its response to Staff's two-paragraph Review and Recommendation, NOPEC argued, at length, that the Review and Recommendation be "rejected because it fails to address the central issues in this proceeding." NOPEC Response to Supplemented Application and Staff Recommendation (R. 36) at 10-11.

issue in this proceeding. NOPEC's position was that because these officers and directors should be disqualified, FirstEnergy Advisors' application provided no legitimate officers and directors upon which the Commission could make its determination under O.A.C. 4901:1-24-10(C)(1). NOPEC Application for Rehearing (R. 45) at 17-19 (NOPEC Appx. at 28-30.) Management that is disqualified from serving under the Commission's rules cannot be "fit" to provide service under O.A.C. 4901:1-24-10(C)(1). Indeed, NOPEC specifically devoted an entire assignment of error in its application for rehearing to this issue.[9] The Commission's finding that NOPEC did not "materially dispute" Staff's determination is against the manifest weight of the evidence.

1. The Commission's reliance on Staff's meager and conclusory analysis is insufficient to satisfy the requirements of R.C. 4903.09.

The Commission's reliance of Staff's meager and conclusory Review and Recommendation does not meet the standards of R.C. 4903.09. Staff's entire review consisted of the following two paragraphs:

> 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 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

[9] NOPEC Application for Rehearing, Ground for Rehearing IV. D (R. 45 at 17; NOPEC Appx. at 28) states:

> 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.

> 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. [R. 31 at 1.]

The Commission made no findings that support its determination that FirstEnergy Advisors management was fit and capable to provide service or to comply with Ohio law under O.A.C. 4901:1-24-10(C)(1) and (2). Instead, it merely relied on Staff's recommendation, which itself made no factual determinations but adopted the self-serving statements that FirstEnergy Advisors submitted in its Application, as supplemented. The Court addressed this same issue in *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 708 N.E.2d 1255 (1999) ("*Tongren*"). In *Tongren*, Staff also relied only on the joint applicants' statements in making its recommendation. The Court found that the Commission violated R.C. 4903.09 because "…it is impossible to determine what record evidence was considered by the commission other than the conclusion of its Staff and the assertion of factually unsupported conclusions by the companies in the joint application for merger approval." *Tongren,* 85 Ohio St.3d at 91. As in *Tongren*, it is impossible to determine the bases for Staff's recommendation, or upon what facts the Commission based its determination. Under these circumstances, the Court should conclude that the Commission's Order is unlawful under R.C. 4903.09, and remand this case for hearing and appropriate findings. See also: *Ideal Transp. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 195, 326 N.E.2d 861, paragraph one of the syllabus:

> Where an opinion and order of the Public Utilities Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the commission's opinion and order were based, such order fails to comply with the requirements of R.C. 4903.09, and is, therefore, unlawful.

**PROPOSITION OF LAW NO. 3: IT IS UNLAWFUL FOR THE COMMISSON TO SHIFT THE BURDEN OF PROOF FROM THE APPLICANT IN CERTIFICATION PROCEEDINGS BY REQUIRING INTERVENING PARTIES TO SHOW WHY THE APPLICATION SHOULD NOT BE GRANTED.**

Instead of making the factual findings upon which it approved FirstEnergy Advisors' certification application, as required by R.C. 4903.09 and O.A.C. 4901:1-24-10(C), the Commission approved the application based upon Staff's conclusory and scant Review and Recommendation. The Commission approved the application, reasoning that "no party in this case had materially disputed Staff's determination that [FirstEnergy Advisors] had the managerial, technical and financial capability to serve as a CRES power broker and aggregator." Entry on Rehearing (R. 49) at 11 (NOPEC Appx. at 46). In other words, Staff accepted the applicant's statements in the application without any discernible analysis, the Commission adopted Staff conclusory recommendation, and then the Commission required NOPEC and the seven other intervening parties to "materially dispute" the applicant's statements. By requiring NOPEC and other intervenors to disprove the statements in FirstEnergy Advisors' Application, the Commission effectively shifted the burden of proof from FirstEnergy Advisors, where it belongs, to the intervenors. The Commission's finding on this issue is unlawful and reversible error.

**A. It is unlawful for the Commission to approve a certification application on the basis that the intervenors had not "materially disputed" its Staff's determination, when the Commission unlawfully denied intervenors their statutory right to discovery under R.C. 4903.082 and O.A.C. 4901-1-17(A).**

The Commission approved FirstEnergy Advisors' application, finding that NOPEC and the other intervenors did not "materially dispute" that FirstEnergy Advisors had the managerial capability to provide service. As stated above, NOPEC strenuously and conspicuously disputed FirstEnergy Advisors' managerial capability. To the extent the Order intends to convey that the intervenors failed to provide *sufficient information* to dispute FirstEnergy Advisors'

qualifications, the Commission's Order is unlawful because it prevented NOPEC from exercising its statutory right to discovery.

R.C. 4903.082 provides in part:

> All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties.

In implementing this statute, the Commission's rules (O.A.C. 4901-1-16(H)) provide:

> For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term "party" includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed.

In addition, O.A.C. 4901-1-17(A) provides that "discovery may begin immediately after a proceeding is commenced."

NOPEC filed its first set of interrogatories and request for production of documents on FirstEnergy Advisors on February 20, 2020. O.A.C. 4901-1-19; 4901-1-20. (R. 20.) Among other things, the request sought to discover information related to the management capabilities of FirstEnergy Advisors' management team. Specifically, as explained in NOPEC's Motion to Compel, Interrogatories 07 through 17 sought to discover "whether FirstEnergy Advisors has proposed a management team that has the capability to provide service, and is fit to provide service." Similarly, Interrogatories 18(d) and 19(g), as well as Requests for Production of Documents 08-11, sought "to determine the managerial and technical capability the employees" identified in the FirstEnergy Advisors' Application. NOPEC Motion to Compel (R. 20) at16.

FirstEnergy Advisors objected to each interrogatory and request for production of documents on various unfounded grounds, and refused to provide any information whatsoever. NOPEC Motion to Compel (R. 20) at Att. C. NOPEC filed a motion to compel on March 20, 2020, (R. 20) and a reply to FirstEnergy Advisors' memorandum contra on April, 13, 2020. (R. 35.) The Commission issued its Order on April 22, 2020. (R. 43.)

The Commission "sat" on NOPEC's motion to compel until it ruled on the "merits" of FirstEnergy Advisors' Application. Having approved the Application, the Commission denied NOPEC's motion as being "moot." Order (R. 43) at 7-8 (NOPEC Appx. at 007-008). This prevented NOPEC from any discovery in this case. Having unlawfully prevented NOPEC from exercising its statutory rights to discovery, it was also unlawful for the Commission to approve the Application on the basis that NOPEC did not "materially dispute" FirstEnergy Advisors' managerial capability to provide service.

1. An intervenor's discovery rights attach when it files its motion to intervene.

In addition to denying NOPEC its discovery rights for "mootness," the Commission also found that discovery rights do not attach until the Commission sets a "procedural schedule," *i.e.,* deadlines for intervention, discovery, comments, and dates for hearing. Entry on Rehearing (R. 49) at 8 (NOPEC Appx. at 43). The Commission's position is untenable. If the rules permit any person who has filed a motion to intervene to engage in discovery before the motion even is granted, the rules cannot be construed to delay discovery until a procedural schedule is set.[10] In fact, Commission precedent holds that discovery can commence prior to finding reasonable grounds for hearing (R.C. 4905.26), which is a precursor to establishing a procedure schedule. See, *In re Cincinnati Gas & Elec. Co. v. City of Lebanon*, Case No. 05-103-EL-PWC , Entry (February 8, 2005) at 2 ("Although the Commission must still determine if reasonable grounds

[10] NOPEC served its discovery on February 20, 2020 to obtain responses by March 11, 2020 (the 20-day response deadline), in an attempt to accommodate the 90-day deadline then in effect for the Commission to issue its order under O.A.C. 4901:1-24-10(A)(2)(b). Under the Commission's reasoning in its Entry on Rehearing, intervenors would have to wait until the Commission decided to issue a procedural order to commence discovery, further compressing the time for discovery, hearing and the issuance of an order. Ironically, the Commission attempted to justify its denial of NOPEC's motion to compel on the basis of these time constraints, which its pretextual "procedural schedule" rule would only serve to exacerbate.

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.") (NOPEC Appx. at 217); accord *In re Cleveland Elec. Illum. Co. et al*., Case No. 07-385-EL-PWC, Entry April 17, 2007, at 2. (NOPEC Appx. at 220.) See, also, *In re Dayton Power & Light Co*., Case No. 88-1047-EL-UNC, Entry September 12, 1988 (discovery commences when a case is filed) (NOPEC Appx. at 224.) and *In re Columbia Gas of Ohio*, Case No. 11-5351-GA-UNC, Entry January 27, 2012. (NOPEC Appx. a t228.)

Also on point is the recent decision *In re Verde USA Ohio, LLC*, Case Nos. 11-5886-EL-CRES et al. ("*Verde*"), Entry (March 3, 2020), in which the Attorney Examiner found that an intervenor can commence discovery as soon as a motion to intervene is filed, and prior to the Commission setting a procedural schedule or hearing. (NOPEC Appx. at 236.) The Commission's Order attempts to distinguish *Verde* on the basis that a procedural schedule was set in that case. (R. 49 at 8; NOPEC Appx. at 43.) However, the procedural schedule provided only a date by which discovery had to be completed. Setting a discovery end date does not affect that discovery begins as soon as a motion to intervene is filed. Indeed, *Verde* chastises the parties for not responding to previous discovery requests by requiring that the pending responses be provided on an expedited basis. (NOPEC Appx. at 236.) .

2. <u>The Commission is mistaken that the 90-day approval process made it necessary to ignore NOPEC's lawful discovery rights.</u>

In its Entry on Rehearing, the Commission attempts to place the blame on NOPEC for the Commission's failure to rule on NOPEC's motion to compel. The Commission found that NOPEC should have sought an expedited ruling on its motion to assure that the Commission could make is ruling within the statutorily prescribed 90-day time frame provided in R.C. 4928.08(B). Entry on Rehearing (R. 49) at 9 (NOPEC Appx. at 44). The Commission's finding

is so clearly unsupported by the record as to show misapprehension, mistake and willful disregard of duty. *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 447 N.E.2d 733; *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 388 N.E.2d 1237.

The Commission premises its findings on R.C. 4928.08, which provides that when a certification applicate is suspended, the Commission must make a written determination within 90 days, either approving or denying the application. FirstEnergy Advisors' Application was suspended by entry of February 11, 2020. (R. 6.) Under R.C. 4928.08, the Commission *ordinarily* would be required to issue its Finding and Order by May 11, 2020. The pleading cycle on NOPEC's motion to compel ended with NOPEC's reply to FirstEnergy Advisors' memorandum contra the motion on April 13, 2020.[11] (R. 35.) The Commission issued its Order on April 22, 2020. (R. 43.)

However, the Commission failed to recognize that the 90-day deadline for ruling on suspended applications had been tolled due to the COVID-19 pandemic gripping Ohio and affecting the functions of state government. Emergency Orders (Entry, March 16, 2020) (NOPEC Appx. at 208.) The tolling period applied to FirstEnergy Advisors' application and was in effect during the discovery dispute and on April 22, 2020, the date on which the Commission issued its Order. The toll was not lifted until May 20, 2020, and was lifted for applications filed

[11] The Commission opined that NOPEC should have requested an expedited ruling on its motion to compel. However, the Commission ignores that FirstEnergy Advisors filed a motion for protective order while NOPEC was attempting to resolve the discovery dispute. The motion for protective order was filed March 17, 2020, three days before NOPEC's motion to compel, making the pleading cycle for each motion virtually identical. The pendency of FirstEnergy Advisors' motion, for which an expedited ruling was not requested, effectively rendered "moot" any request NOPEC would have made for an expedited ruling on its motion to compel under O.A.C. 4901-1-12. The Commission's finding is unjust, unreasonable and against the manifest weight of the evidence.

on or after June 1, 2020. Emergency Orders (Entry, May 20, 2020) NOPEC Appx at 213). The Commission was under no deadline to issue an order and certainly not by May 11, 2020.

The Commission had an unlimited amount of time to issue an order compelling FirstEnergy Advisors to respond to NOPEC's legitimate discovery requests, hold a hearing, and issue an order in this proceeding. For whatever reason, it chose to do so. That reason cannot be related to the time constraints of R.C. 4928.08(B), because they had been tolled for this Application. The Commission's finding is unjust, unreasonable and against the manifest weight of all evidence.

**PROPOSITION OF LAW NO. 4: WHEN THE COMMISSION UNLAWFULLY DENIES A PARTY ITS STATUTORY RIGHT TO DISCOVERY, IT IS UNJUST AND UNREASONABLE TO REQUIRE THAT PARTY TO SHOW PREJUDICE BY THE COMMISSION'S ORDER.**

The Commission also erred by requiring NOPEC to show that it was prejudiced by the Commission's Order. Entry on Rehearing (R. 49 at 7; NOPEC Appx. at 42.) Discovery is the means by which a party produces evidence of prejudice. The Commission simply cannot require a showing of prejudice when it denied NOPEC's statutory right to discovery. Moreover, this Court has held that when a case must be remanded because the Commission violated R.C. 4903.09, as here, prejudice need not be shown, but will be considered on remand and subsequent appeal, if necessary. *Tongren, 85 Ohio St.3d* at *91*.

Regardless, NOPEC has been prejudiced. The Commission's Code of Conduct provisions at issue are prophylactic in nature, *e.g.*, the rules are meant to prevent even the *potential* for market abuses that would violate R.C. 4929.02 and 4928.17. For example, O.A.C. 4901:1-37-4(D)(3) prevents FirstEnergy Advisors employees' merely from having access to the EDUs' information that is not contemporaneously shared with other CRES providers. O.A.C 4901:1-37-04(D)(3)). Similarly, the FirstEnergy EDUs cannot indicate on lists provided to its

customers that any identified CRES provider is an affiliate. O.A.C. 4901:1-37-04(D)(7). NOPEC has shown prejudice by showing that the relationship between FirstEnergy Advisors and the FirstEnergy EDUs violates the Code of Conduct, requiring a preventative remedy, *e.g.*, a change in FirstEnergy Advisors management and trade name.

The Commission obviously recognized such potential abuses and chose to consider them in a separate case. The Commission should, and could, have considered them at hearing in this proceeding before permitting FirstEnergy Advisors authority to operate. O.A.C. 4901:1-23-10(C). Its failure to do so is reversible error.

**PROPOSITION OF LAW NO. 5. THE COMMISSION ABUSED ITS DISCRETION NOT TO HOLD A HEARING IN THIS CASE WHEN NOPEC PROVIDED GOOD CAUSE THAT FIRSTENERGY ADVISORS WAS VIOLATING THE CODE OF CONDUCT, AND THE COMMISSION RECOGNIZED GOOD CAUSE BY DEFERRING THAT ISSUE TO ANOTHER CASE.**

As stated above, NOPEC and OCC's Joint Motion requested that the Commission hold a hearing in this case to resolve FirstEnergy Advisors' Code of Conduct violations. Indeed, the other intervenors in the case also requested a hearing in this case. The Commission refused to do so, citing the discretion afforded it under O.A.C. 4901:1-24-10(A)(2)(c). Order (R. 43) at 7 (NOPEC Appx. at 007). Entry on Rehearing (R. 49) at 10 (NOPEC Appx. at 45). The Commission abused its discretion.

NOPEC provided good cause for hearing by showing that FirstEnergy Advisors was violating the Code of Conduct. NOPEC based its showing, in part, upon the independent auditor's report filed in the Audit Case. Although the report focuses on defunct FES's relationship with the FirstEnergy EDU's, it is instructive as to when EDU-affiliate conduct crosses the line and violates the Code of Conduct. The Audit Report supports NOPEC's request for hearing.

The independent auditor filed its report on May 14, 2018.[12] Among other things, the auditor found that it was improper to comingle management from the FES' sales division as part of the senior leadership team of FirstEnergy's Service Company. The auditor found that FirstEnergy Service Company (which provides legal and back office support for the EDUs and their CRES affiliates) "primarily serves the FirstEnergy regulated operating companies," and that it was "problematic" and "highly inappropriate" for the FES vice president to attend Service Company executive meetings with other Service Company executives who were focused on the regulated utility operations. Audit Report at 34 and 39 (NOPEC Appx. at 102 and 107).

The Audit Report was correct that it was inappropriate to comingle management from the FES sales division as part of the senior leadership team of FirstEnergy Service Company. 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. Audit Report at 34 (NOPEC Appx. at 102).

This problem is exponentially exacerbated in this proceeding. The Audit Report involved only one officer of FirstEnergy Solutions who was shared with FirstEnergy Service Company and therefore privy to regulated and unregulated reports. Under this Application, based on publicly available information at the time the Application was filed, all three of FirstEnergy Advisors' managers (which are, in a limited liability company, akin to the directors of a corporation ) hold the highest level executive positions with FirstEnergy Corp. and FirstEnergy Services Company. Moreover, two of FirstEnergy Advisors' managers also are directors of the

[12] 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").

FirstEnergy EDUs. Joint Motion (R. 2 at 8-15); NOPEC Application for Rehearing (R. at 28-30).

| COMMON MANAGERS/DIRECTORS/EXECUTIVE OFFICERS | | |
|---|---|---|
| FirstEnergy Corp/FirstEnergy Service Company | FirstEnergy Advisors | Regulated Utilities |
| Charles Jones,<br>CEO, Pres FE Utilities (FEC) | Charles Jones,<br>Manager | Charles Jones<br>Director |
| D.M. Chack, Pres. FE Ohio Utilities (FEC)<br>Sr. VP Mkting/Branding (FESC) | D.M. Chack,<br>Manager | |
| S.E. Strah, Sr. VP (FEC)<br>CFO (FESC) | S.E. Strah,<br>Manager | S.E. Strah<br>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. R.C. 4928.17, O.A.C. 4901:1-10-37(A)(4) ).

The auditor also recommended that the "FirstEnergy" name be removed from FES's name, noting that "[u]sing '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." Audit Report at 98 (NOPEC Appx. at 166). To support its recommendation, the Audit Report noted that FEC works hard to promote its brand name in Ohio. For example, it acquired the naming rights for the Cleveland Browns' stadium, re-naming it "FirstEnergy Stadium." These stand-alone corporate brandings then are applied to FirstEnergy Corp.'s subsidiaries either as a part of their names (*e.g.*, FirstEnergy Solutions; FirstEnergy Products, and now FirstEnergy Advisors), or in the descriptions of the regulated utilities (*e.g.*, Ohio Edison, A FirstEnergy Company). Audit Report at 97-98. (NOPEC Appx. at 165-167.)

The regulated utilities provided vertically integrated monopoly service (generation, distribution and transmission services) to their customers for decades before the advent of competitive retail generation service in Ohio in 2000. They continue to provide monopoly distribution service to all consumers in their service territories. As the Audit Report found, the widespread use of the "FirstEnergy" name connotes to customers that the competitive affiliate is a part of the FirstEnergy family that has been providing "trusted utility service" for years. The natural result of this branding is that customers will give greater consideration to the FirstEnergy affiliate in making their decisions about which supplier to choose. Audit Report at 98. (NOPEC Appx. at 166.)

The Commission recognized the seriousness of NOPEC's allegations, as evidenced by its decision to consider these issues in the pending Audit Case (Audit Case, Entry (April 29, 2020), (NOPEC Appx. at 62)), and that the auditor could be called to address its findings at hearing in that case. Entry on Rehearing (R. 49) at 6 (NOPEC Appx. at 41). However, the Commission was required by O.A.C. 4901:1-24-10(C), to decide these issues in this case before granting FirstEnergy Advisors a certificate to operate. Having recognized good cause for considering these issues in the Audit Case, with NOPEC, OCC and the other intervenors all requesting a hearing, the Commission's refusal to conduct a hearing in this case constitutes an abuse of discretion.

WHEREFORE, NOPEC respectfully submits that the PUCO's Order is unlawful, unjust and unreasonable. The Order granting FirstEnergy's certificate to provide CRES should be reversed and this case remanded to the Commission. The Commission should be instructed to hold a hearing to determine whether FirstEnergy Advisors is fit and capable of providing service and complying Commission rules before it is allowed to operate.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Merit Brief was served upon the parties of record this 26th day of October 2020, via electronic transmission.

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Supreme Court of Ohio Clerk of Court - Filed January 25, 2021 - Case No. 2020-1009

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| In re the Application of Suvon, LLC d/b/a/ FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio. | ) ) ) ) ) | Supreme Court Case No. 2020-1009<br>On Appeal from the Public Utilities Commission of Ohio<br>PUCO Case No. 20-103-EL-AGG |

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## TABLE OF CONTENTS

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

I. INTRODUCTION AND SUMMARY ..... 1

II. ARGUMENT ..... 3

A. NOPEC asserted, and Appellees acknowledged, that FirstEnergy Advisors' alleged violation of the affiliate code of conduct was a disputed material fact in this proceeding. The Commission's failure to resolve the issue through hearing was an abuse of discretion. ..... 3

1. Material issues of fact were raised and not resolved in this proceeding. ..... 3

2. The Commission abused its discretion by failing to hold a hearing on whether FirstEnergy Advisors was in violation of the affiliate code of conduct. ..... 5

B. Personal prejudice (or harm) need not be shown when the Commission's order prejudices the public interest, when the Commission prevents the exercise of discovery rights and when the Commission violates R.C. 4903.09 ..... 7

1. Prejudice to the Public Interest ..... 8

2. Personal prejudice need not be shown. ..... 9

C. The Commission erred in denying NOPEC its right to discovery, which attaches at the commencement of a proceeding. ..... 11

1. Commission precedent provides that the right to discovery attaches upon commencement of a proceeding. ..... 11

2. Appellees' miscellaneous arguments are meritless ..... 13

D. The Commission's order and entry on rehearing violate R.C. 4903.09 because they never explain how the facts of this case meet the requirements of R.C. 4928.08(B) and O.A.C. 4901:1-24-10(C). ..... 16

III. CONCLUSION ..... 20

CERTIFICATE OF SERVICE ..... 22

## TABLE OF AUTHORITIES

**CASES**

*Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 638 N.E.2d 516 (1994) ..... 17

*Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983) ..... 6

*Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, 156 Ohio St. 360, 102 N.E.2d 842 (1951) ..... 18

*In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 ..... 20

*In re Cincinnati Gas & Elec. Co. v. City of Lebanon*, Case No. 05-103-EL-PWC (February 8, 2005) ..... 12

*In re Cleveland Elec. Illum. Co. et al.*, Case No. 07-385-EL-PWC (April 17, 2007) ..... 11

*In re Columbia Gas of Ohio*, Case No. 11-5351-GA-UNC ..... 11

*In re Duke Energy Ohio, Inc.*, 148 Ohio St.3d 510, 2016-Ohio-7535, 71 N.E.3d 997 ..... 19

*In re Verde USA Ohio, LLC,* PUCO Case No. 11-5886-EL-CRS (March 3, 2020) ..... 12

*In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings during the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC (March 16, 2020) ..... 15

*MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 513 N.E.2d 337 (1987) ..... 18

*Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 ..... 13

*Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4 ..... 17

S*AGE 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*, Case No. 17-974-EL-UNC (May 14, 2018) ("Audit Report") NOPEC Appx. at 67 ..... 1

*Sanders Transfer, Inc. v. Pub. Util. Comm'n*, 58 Ohio St. 2d 21, 387 N.E.2d 1370 (1979) ..... 6, 9

*State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953) ..... 6

*State ex rel. Wilms v. Blake et al., Industrial Commission* (1945), 144 Ohio St. 619, 60 N.E.2d 308 ..... 6

*Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 708 N.E.2d 1255 (1999) ..... 10, 19

**STATUTES**

R.C. 4901.13 ..... 6

R.C. 4903.02 ..... 18

R.C. 4903.081 ..... 15

R.C. 4903.082 ..... 15

R.C. 4903.09 ..... passim

R.C. 4903.12 ..... 15

R.C. 4903.13 ..... 15, 18

R.C. 4903.221 ..... 15

R.C. 4909.18 ..... 12

R.C. 4928.06(A) ..... 18

R.C. Chapter 4903 ..... 15

**TREATISES**

Ohio Adm.C. 4901:1-37-24(D)(7) ..... 4, 9, 21

Ohio Adm.Code 4901- 1-16(B) ..... 17

Ohio Adm.Code 4901:1-24-10(A)(2)(c) ..... 6

Ohio Adm.Code 4901:1-24-10(C) ..... 19

Ohio Adm.Code 4901:1-24-10(C)(1) ..... 4, 5

Ohio Adm.Code 4901:1-24-10(C)(2) ..... 4, 5

Ohio Adm.Code 4901:1-37-04 ..... 1

Ohio Adm.Code 4901:1-37-04(A)(4) ..... 21

Ohio Adm.Code 4901:1-37-04(D)(3) ..... 4, 9

Ohio Adm.Code 4901-1-17 ..... 13

Ohio Adm.Code 4901-1-17(A) ..... 17

**OTHER AUTHORITIES**

*In re Chapters 4901-1, 4901-3 and 4901-9 of the Ohio Administrative Code,* Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006)..... 12

*In re Triennial Review Regarding Local Circuit Switching,* Case No. 03-2040-TP-COI, Entry on Rehearing (October 28, 2003)..... 13

## I. INTRODUCTION AND SUMMARY

The Public Utilities Commission of Ohio ("PUCO" or "Commission") has been on notice for years, through an independent audit report,[1] that the regulated FirstEnergy electric distribution utilities ("EDUs") are violating the Commission's affiliate code of conduct rules.[2] The rules apply to EDUs' relationships with their competitive affiliates to prevent the affiliates from having an unfair advantage over the affiliates' competitors in the electricity marketplace. Specifically, the Audit Report faulted the FirstEnergy EDUs and their then-affiliate, FirstEnergy Solutions, for sharing the same employees and the same trade name. Audit Report at 34, 39 and 98 (NOPEC Appx. at 102, 107 and 166). The audit case has been pending since 2017.

When a new FirstEnergy affiliate, Suvon LLC d/b/a FirstEnergy Advisors ("FirstEnergy Advisors") filed a certification application with the Commission to provide power brokerage and aggregation services in Ohio, Appellants[3] moved to suspend the application. Joint Motion to Suspend Application (R. 4). Appellants sought suspension on the same bases as contained in the audit report – that employees were being improperly shared and the same trade name was being used in violation of the code of conduct rules. The Commission's attorney examiner moved quickly to suspend the application for these reasons the following day. Entry (R. 6). Working behind the scenes in tandem with PUCO staff ("Staff"), FirstEnergy Advisors filed a supplement to its application. Supplement to Application (R. 29). The supplement attempted to explain why FirstEnergy Advisors' use of shared employees and the same trade name did not violate the code of conduct. Thus, the attorney examiner, Staff and even FirstEnergy Advisors recognized that a

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[1] S*AGE 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*, Case No. 17-974-EL-UNC (May 14, 2018) ("Audit Report"). NOPEC Appx. at 67.

[2] See Ohio Admin. Code ("O.A.C.") 4901:1-37-04. NOPEC Appx. at 255.

[3] Northeast Ohio Public Energy Council ("NOPEC") and the Office of the Ohio Consumers' Counsel ("OCC") each filed an appeal to the Commission's order in this proceeding and are jointly referred to as "Appellants."

*material disputed issue* in this case was whether the proposed sharing of employees and a trade name with the FirstEnergy EDUs violated the code of conduct.

Despite Staff's and FirstEnergy Advisors' acknowledgement that the alleged code of conduct violations were a material and disputed issue in this case, Staff did not address the alleged violations in its abbreviated, two-paragraph recommendation that the Commission approve the application. Staff Review and Recommendation (R. 31). Nor did the Commission attempt to resolve the issue in its order. Instead, it closed its eyes, punted the issue to the still-pending audit case, and permitted FirstEnergy Advisors to operate in Ohio knowing full well its operations could be violating the code of conduct rules. Finding and Order (R. 43); Entry on Rehearing (R 49). Those violations give FirstEnergy Advisors a competitive advantage over its competitors, including NOPEC.

This chain of events begs the question: What happened from the time of Staff's aggressive pursuit of the potential code of conduct violations until the time the Commission issued its order that refused to resolve them? The eight intervenors in this case (united on the need for hearing in this case), as well as the public, have no idea because the Commission refused to permit discovery, hold a hearing, or provide any findings supporting its order. The Commission's justification for not holding a hearing was that litigation would prejudice FirstEnergy Advisors by delaying the commencement of its operations (*i.e.*, its ability to make money). PUCO Merit Brief at 10, 17; Entry on Rehearing (R. 49 at 6, 7). In other words, for fear that FirstEnergy Advisors would lose money from a delay in initiating business operations, the Commission willfully permitted FirstEnergy Advisors to begin operations even though it recognized those operations could be unlawful. The Commission did so regardless of how the unlawful operations could prejudice NOPEC, the seven other intervenors in this case, and Ohio's

competitive retail electric market. The Commission's unreasonable and unconscionable partiality to FirstEnergy Advisors was an abuse of discretion.

The intervenors and the public need full transparency in Commission orders, especially at a time when the Commission's actions are under scrutiny during the Ohio House Bill 6[4] scandals, which have resulted in the PUCO chair's resignation. NOPEC requests that the order granting FirstEnergy's certificate to provide competitive retail electric service ("CRES") be reversed and this case remanded to the Commission. The Commission should be instructed to hold a hearing to determine whether FirstEnergy Advisors is fit and capable of providing service and complying with Commission rules before it is allowed to operate.

## II. ARGUMENT

### A. NOPEC asserted, and Appellees acknowledged, that FirstEnergy Advisors' alleged violation of the affiliate code of conduct was a disputed material fact in this proceeding. The Commission's failure to resolve the issue through hearing was an abuse of discretion.

#### 1. Material issues of fact were raised and not resolved in this proceeding.

To evade the code of conduct violations placed at issue in this case, the Commission in its orders and now Appellees[5] on brief, assert that the alleged violations are beyond the scope of this certification proceeding. They assert that the only issue is whether FirstEnergy Advisors has the requisite "managerial, technical and financial" capability to provide service and comply with Ohio law.[6] Of these, only managerial capability was contested in this case. In this context, Appellees claim that this managerial issue is narrowly tailored to whether FirstEnergy Advisors' managers have the qualities, such as the experience, training and/or education, to operate

[4] 2019 Am. Sub. H.B. No. 6.
[5] The Commission, the appellee in this case, and FirstEnergy Advisors, an intervening appellee, are jointly referred to as "Appellees."
[6] Order (R. 43 at 7; Entry on Rehearing (R. 49 at 10, 11, 12, and 13); PUCO Merit Brief at 15-18; FirstEnergy Advisors Merit Brief at 12-13.

FirstEnergy Advisors as a going concern. They further completely misrepresent the issue by claiming that Appellants did not "materially dispute" Staff's finding that the managers had this requisite capability.[7] Their claims are utter nonsense.

To approve a suspended certification application, the Commission must make the affirmative findings that FirstEnergy Advisors is fit and capable of (1) performing the services proposed and (2) complying with the Commission's rules and orders. O.A.C. 4901:1-24-10(C)(1) and (2). Appx. at 252. NOPEC has claimed throughout this proceeding that FirstEnergy's Advisors failed both tests.[8] FirstEnergy Advisors is not fit and capable of complying with the PUCO's rules and orders because its very application proposed to violate the affiliate code of conduct, by sharing its management team and brand name with the FirstEnergy EDUs.[9] O.A.C. 4901:1-37-04(D)(3) and (7). Appx. at 255. In addition, FirstEnergy Advisors is not fit and capable of performing the services it proposed because the FirstEnergy EDUs' directors cannot also serve as managers of FirstEnergy Advisors. O.A.C. 4901:1-37-04(D)(3). *Id*. Having failed to identify legitimate managers, *i.e*., persons who were not also managing the regulated FirstEnergy EDUs, it was impossible for FirstEnergy Advisors to show, or the Commission to find, that yet-unnamed legitimate managers had the requisite managerial capability to perform the service.[10] It's that simple. It was incumbent upon the PUCO to address the material issue of FirstEnergy's compliance with the code of conduct in order to make the affirmative findings required by O.A.C 4901:1-24-10(C)(1) and (2). Appx. at 252. It never did.

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[7] See FirstEnergy Advisors' Merit Brief at 12, 26 and 33; PUCO Merit Brief at 3, 5, 8 and 24-26; Entry on Rehearing (R. 49 at 12).
[8] See, *e.g*., NOPEC's Application for Rehearing (May 22, 2020) (R. 45 at 13-15, 17-19).
[9] Application (R. 2 at Exhibits 12 and Appx. 13).
[10] NOPEC also challenged whether FirstEnergy Advisors' selected managers and officers had the capability to perform service through its discovery requests. Motion to Compel (March 30,2020) R. 20 at Interrogatories 2-4 and 18-19). However, FirstEnergy Advisors failed to respond to the discovery requests and the Commission denied NOPEC's motion to compel them to do so.

Indeed, the attorney examiner, Staff and even FirstEnergy Advisors acknowledged that the alleged code of conduct violations were material disputed issues in this case. The attorney examiner suspended FirstEnergy Advisors' application for this very reason,[11] and Staff and FirstEnergy Advisors orchestrated FirstEnergy's supplement to its application behind the scenes, without public scrutiny, in an to attempt to address these code of conduct concerns. Supplement to Application (R. 29). Appellees' claim, and the Commission's finding, that NOPEC did not dispute any material issue in Staff's recommendation are false and wrong and should be rejected.

2. The Commission abused its discretion by failing to hold a hearing on whether FirstEnergy Advisors was in violation of the affiliate code of conduct.

Whether FirstEnergy Advisors was violating the affiliate code of conduct was a material and disputed issue of fact and law in this case. The issue required full discovery and a hearing to resolve it prior to permitting FirstEnergy Advisors to operate unlawfully in the competitive retail electric market. The Commission denied NOPEC's due process rights by refusing to permit either. Appellees claim that it was in the Commission's discretion to hold a hearing in this matter. Although the rules provide the Commission discretion,[12] Ohio law does not permit the Commission to abuse that discretion. The Commission did so in this case.

To further support their position that the Commission's decision whether to hold a hearing is beyond challenge, Appellees rely on R.C. 4901.13.[13] This statute provides that the Commission "may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all…investigations, and hearings relating to the parties before it." Appellees further argue that this Court will not interfere with the Commission's discretion except in *extreme* cases. *Sanders Transfer, Inc. v. Pub. Util. Comm'n*, 58 Ohio St. 2d 21, 23, 387 N.E.2d

[11] Entry (R. 6).
[12] O.A.C. 4901:1-24-10(A)(2)(c). Appx. at 252.
[13] PUCO Merit Brief at 6, 7; FirstEnergy Advisors Merit Brief at 3, 14.

1370, 1372 (1979) ("*Sanders*"). The statute and case law that Appellees cite add nothing to this debate. NOPEC concedes that the Commission has the discretion to hold a hearing in certification applications. NOPEC's point is that this truly is an *extreme* case that requires the Court's intercession, because the Commission abused its discretion by permitting FirstEnergy Advisors to operate while acknowledging that its operations could be in violation of law.

The term "abuse of discretion" is defined to mean "more than an error of law or error of judgment. * * * It means 'discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.'" *State ex rel. Wilms v. Blake et al., Industrial Commission*, 144 Ohio St. 619, 624, 60 N.E.2d 308, 311 (1945) ("*Wilms*"). See, also, *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983) ("*Blakemore*") ("The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."). In *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590–591, 113 N.E.2d 14, 19 (1953) ("*Schafer*"), the Court found that "[t]he exercise of an honest judgment, however erroneous it may seem to be, is not an *abuse of discretion.* Abuse of discretion * * * implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.")

In this proceeding, and for a number of years prior, the Commission was aware that the FirstEnergy EDUs were allegedly violating the code of conduct, as reflected in the Audit Report. Appellants raised these same issues in this case as they related to the FirstEnergy EDUs' newest affiliate seeking certification, FirstEnergy Advisors. Remarkably, the Commission acknowledges that FirstEnergy Advisors may be in violation of the code of conduct provisions. However, instead of addressing the issue in this case *before* FirstEnergy Advisors commenced operations (as it should have), it punted the issue for future determination in the still-pending audit case.

Order (R. 43 at 6); Entry on Rehearing (R. 49 at 13). The reason the Commission did not resolve these allegations in this proceeding before FirstEnergy Advisors commenced operations was that it believed litigating the issues would unduly prejudice FirstEnergy Advisors' ability to commence operations. PUCO Merit Brief at 10, 17; Entry on Rehearing (R. 49 at 6, 7). In other words, for fear that FirstEnergy Advisors would lose money from a delay in business operations, the Commission willfully permitted FirstEnergy Advisors to begin operations even though it recognized those operations could be unlawful. The Commission did so regardless of how the unlawful operations could prejudice NOPEC, the seven other intervenors in this case, and Ohio's competitive retail electric market. The Commission's order meets the definition of an abuse of discretion provided in *Wilms* and *Blakemore* because it was unreasonable, arbitrary and unconscionable. Indeed, under *Shafer*, the order constitutes an abuse of discretion because it reflects an extreme degree of partiality in favor of FirstEnergy Advisors and against the interests of the intervenors in this case, by requiring them to compete on an unlevel playing field. This Court should so find.

### B. Personal prejudice (or harm) need not be shown when the Commission's order prejudices the public interest, when the Commission prevents the exercise of discovery rights and when the Commission violates R.C. 4903.09.

It its merit brief, NOPEC explained that (1) it was prejudiced by FirstEnergy Advisors' violation of the Commission's affiliate code of conduct, and (2) that it was unable to show personal prejudice (or harm) because it was denied its lawful right to discovery. NOPEC Merit Brief at 21. FirstEnergy Advisors believes that these positions are inconsistent. FirstEnergy Advisors' Merit Brief at 32. FirstEnergy Advisors either misunderstands the issue, or attempts to confuse the concepts of personal prejudice and prejudice to the public interest.

1. Prejudice to the Public Interest

FirstEnergy Advisors claims that its only burden in a certification application is to show that it has the capability to perform service and follow the Commission's rules and orders. FirstEnergy Advisors Merit Brief at 30. It believes that prejudice can attach only after it begins operations and commits a rules infraction for which the Commission can order a hearing, determine harm, and provide redress. FirstEnergy Advisors also asserts that NOPEC has not been personally harmed because it will be permitted to address the alleged violations in the still-pending audit case. *Id.*, at 31. The Commission makes a similar argument in its merit brief and even adds that the issues can be revisited when FirstEnergy Advisors files its two-year renewal application – all while FirstEnergy Advisors is operating unlawfully. PUCO Merit Brief at 10.

FirstEnergy Advisors completely misses the point. It proposed to violate the Commission's rules (code of conduct) in the very application it filed by improperly sharing its management and trade name with the FirstEnergy EDUs. By sharing a management team with the most senior FirstEnergy EDU managers, FirstEnergy Advisors' managers necessarily would have access to the FirstEnergy EDUs' information, which the EDU's could not contemporaneously share with other CRES providers, including NOPEC. Each member of the shared management team, as employees of the FirstEnergy EDUs, has no way of quarantining this information from themselves as managers of FirstEnergy Advisors. This per se violates O.A.C. 4901:1-37-4(D)(3). Appx. at 255.

Similarly, the FirstEnergy EDUs are required to provide lists of all CRES providers to customers upon request, but are prohibited from identifying any CRES provider as an affiliate, in order that a preference not be shown for the affiliate. By sharing the same brand name, FirstEnergy Advisors necessarily is identified as an affiliate when the FirstEnergy EDUs provide customers the CRES list. This violates O.A.C. 4901:1-37-04(D)(7). Appx. at 255. Under

FirstEnergy Advisors' concept of prejudice, the PUCO would not be permitted to address this code of conduct violation until the EDUs actually provided their customers the lists they are required to provide by law. It is against the public interest for the Commission to knowingly permit this certain infraction of its rules to occur once FirstEnergy Advisors is certificated and added to the CRES list. When an order is against the public interest, a showing of personal harm is not required. See *Sanders*, 58 Ohio St. 2d 21, 23 (harm caused by an unauthorized expansion of service need not be personal in nature when it affects the public interest). It is in this context that NOPEC explained in its merit brief that prejudice attaches to the public interest by FirstEnergy Advisors' violation of the affiliate code of conduct. The prejudice requires a preventive remedy – a denial of the certification application, absent a change in FirstEnergy Advisors' management and trade name.

2. Personal prejudice need not be shown.

FirstEnergy Advisors views the concept of prejudice as tangible personal harm, which judicial bodies can redress. It is in this sense that NOPEC stated in its initial brief that it was unable to show personal harm because it was denied its right to discovery and a public hearing in this case. The Court must consider the background to this proceeding.

NOPEC, as a regional council of governments, provides governmental aggregation services to more than 220 communities in 18 Ohio counties. Historically, it competed with the FirstEnergy EDUs' affiliate, FirstEnergy Solutions, which also had personnel that solicited and served community aggregations. FirstEnergy Solutions had its headquarters in a different location than the EDUs. Upon the passage of Ohio House Bill 6, and FirstEnergy Solutions' emergence from bankruptcy as Energy Harbor, at least some of FirstEnergy Solutions aggregation personnel joined FirstEnergy Advisors, which now is housed in the EDUs' offices with common management teams. NOPEC served discovery on FirstEnergy Advisors to

determine what personnel from FirstEnergy Solutions would be joining FirstEnergy Advisors, and what material on FirstEnergy Solutions aggregated communities they would bring with them and share with their common officers, directors and managers. (R. 20 at Interrogatories 2-4, 18-19). NOPEC also sought to discover the extent to which senior officers, directors and managers would be shared with the EDUs, and any meeting minutes to clarify the intended relationship between the EDUs, FirstEnergy Advisors, and even Energy Harbor. NOPEC Motion to Compel (R. 20 at Interrogatories 5-16) Far from the "fishing expedition" that FirstEnergy Advisors claims,[14] this information was germane to the code of conduct violations. Consider the following:

> With knowledge of the former FirstEnergy Solutions community aggregations, a FirstEnergy EDU employee or officer could meet with an elected official of one of those communities in a government relations capacity. The EDU employee or officer, with knowledge of the communities' aggregation needs, could suggest to the elected official that he or she contact a FirstEnergy Advisors employee or officer to meet the communities' aggregation needs. Or the EDU employee or officer could walk down the hall in their shared office and mention the business opportunity to the FirstEnergy Advisors' employee, to earn a potential fee.

FirstEnergy Advisors refused to respond to the discovery, and the Commission refused NOPEC's motion to compel responses, which were meant to elicit information about who could share information, what information would be shared, and how. Because the Commission refused NOPEC's right to discovery, it is not required to show the tangible personal harm.

Moreover, as explained in NOEPC's merit brief, a showing of tangible harm is not required when the Commission has failed, as here, to provide the underlying basis for its order in violation of R.C. 4903.09 (Appx. at 240). *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 91, 708 N.E.2d 1255 (1999).

[14] FirstEnergy Advisors Merit Brief at 6, 32.

### C. The Commission erred in denying NOPEC its right to discovery, which attaches at the commencement of a proceeding.

#### 1. Commission precedent provides that the right to discovery attaches upon commencement of a proceeding.

Appellees assert that the right to discovery does not commence until the Commission issues a procedural entry setting a matter for hearing. PUCO Merit Brief at 12; FirstEnergy Advisors Merit Brief at 17. Appellees' argument fails for two reasons. First, as stated above, the Commission abused its discretion by failing to set this matter for hearing. Under Appellees' rationale, if parties are entitled to discovery when a hearing is set and the Commission abuses its discretion to set the matter for hearing, it follows that the Commission necessarily abuses its discretion by not permitting discovery.

Second, the Commission repeatedly has found that the right to discovery commences prior to its determination whether to hold a hearing. On point is *In re Columbia Gas of Ohio*, Case No. 11-5351-GA-UNC, Entry (January 27, 2012) ("*Columbia*"), 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 PUCO found that intervenors could seek discovery prior to the PUCO'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 at 3-4 (Appx. at 228). See, also, *In re Cleveland Elec. Illum. Co. et al.*, Case No. 07-385-EL-PWC, Entry (April 17, 2007) at 2 (Appx. at 220) ("Although the Commission must still determine if reasonable grounds for complaint have been stated [*i.e.*, whether hearing should be set], the parties are reminded that, pursuant to Rule 4901-1-17, O.A.C. (Appx. at 262), 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 (Appx. at 217).

The recent attorney examiner's entry in *Verde*[15] recognizes the continued application of the Commission's precedent. On brief, Appellees half-heatedly attempt to defend the Commission's misapplication of *Verde* in its Order in this case.[16] However, they cannot reasonably deny Verde's similarities, but a different outcome: (1) Verde's certification application was suspended, (2) the attorney examiner explicitly refused to set a hearing, yet (3) discovery was permitted to commence prior to hearing being set. Indeed, the entry chastised Verde for not responding to all discovery served prior to the procedural entry by directing that those requests be answered in expedited fashion. Despite Appellees' attempts, *Verde* cannot be distinguished factually from this case.

FirstEnergy Advisors cites two cases in an attempt to distinguish the Commission's precedent.[17] Neither is on point. First, the Commission denied an OCC proposal in a rulemaking case[18] that, if adopted, would permit "any interested person [to] have the right to intervene, conduct discovery, and present evidence in any Commission case." OCC's request was much broader than the discovery rights at issue in the present case and would have permitted universal participation in all PUCO proceedings. In this case, NOPEC's intervention was

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[15] *In re Verde USA Ohio, LLC,* PUCO Case No. 11-5886-EL-CRS, Entry (March 3, 2020) (Appx. at 232).

[16] Finding and Order (R. 43 at 8). Appellees attempt to nuance the findings in *Verde* by claiming that, even though the attorney examiner did not order a hearing, she nevertheless set a procedural schedule. However, that schedule only set a date for discovery to be completed, because discovery served prior to the entry was deemed proper. PUCO Merit Brief at 12-13; FirstEnergy Advisors Merit Brief at 16-17.

[17] FirstEnergy Merit Brief at 14-15.

[18] See *In re Chapters 4901-1, 4901-3 and 4901-9 of the Ohio Administrative Code,* Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006) at paragraph 9 ("*In Re Chapter 4901-1*"). Supp. Appx. at 001).

unopposed, the issues were identified, and NOPEC would have participated in a hearing if hearing were ordered. In accordance with the PUCO precedent cited above (which was decided *after In Re Chapter 4901-1*), NOPEC sought and was entitled to commence discovery to *prepare* for hearing and the comments it filed in response to Staff's recommendation.

Second, FirstEnergy Advisors relies on a case in which the Federal Communications Commission delegated to the Commission the daunting task of determining the "unbundling" obligations of *all* of Ohio's incumbent local exchange companies.[19] Noting that the case was a "highly unique and complex proceeding,"[20] the PUCO permitted discovery, but initially managed it by having all parties respond in writing to questions the PUCO had posed. It subsequently permitted depositions. *Triennial Review* does not support FirstEnergy's position. Discovery was permitted. Although the Commission managed the discovery, the case has little if any precedential value because the Commission's subsequent cases, as cited above, have consistently permitted fully discovery upon intervention.

2. Appellees' miscellaneous arguments are meritless.

Appellees also make several meritless arguments that discovery does not begin upon commencement of a proceeding.

Appellants relied, in part, on the liberal discovery policy provided in R.C. 4903.082[21] to support the position that the right to discovery should be liberally construed.[22] However, the Commission contends that because this provision is contained in R.C. Chapter 4903, which is

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[19] *In re Triennial Review Regarding Local Circuit Switching,* Case No. 03-2040-TP-COI, Entry on Rehearing (October 28, 2003) ("*Triennial Review")* at paragraph 8. Supp. Appx. at 130.
[20] *Id*., paragraph 8.
[21] R.C. 4903.082 provides in part, "[a]ll parties and *intervenors* shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties."
[22] See, also, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶¶ 82-83.

captioned "Hearings," the right to discovery does not attach until a procedural schedule is issued setting a matter for hearing. The Commission's interpretation is contrary to its own orders and those of its attorney examiners cited above. Moreover, the provisions of R.C. Chapter 4903 are not limited to matters involving hearings. For example, R.C. 4903.221 (Supp. Appx. at 140) permits motions to intervene prior to matters being set for hearing. In addition, other provisions of R.C. Chapter 4903 do not relate to the PUCO hearing process, *e.g.*, R.C. 4903.081 (Supp. Appx. at 138) (prohibits ex parte communications after a case is assigned a docket number and prior to hearing bearing being set), and R.C. 4903.12 (Supp. Appx. at 139) and 4903.13 (Appx. at 241) (govern the Ohio Supreme Court's jurisdiction over appeals from the Commission and its standard of review and method for perfecting an appeal).

In its order, the Commission incorrectly attempted to blame NOPEC for the Commission's failure to rule on NOPEC's motion to compel discovery. It found that NOPEC failed to expeditiously prosecute its motion to compel discovery prior to the statutory deadline to rule on the suspended application. The Commission erroneously found that it was required by statute to issue an order within 90 days of the application's suspension. Entry on Rehearing (R. 49 at 8-9). Under the statute, an order was required to be issued by May 11, 2020. The pleading cycle ended on NOPEC's motion to compel FirstEnergy to respond to its discovery on April 13, 2020. Yet the Commission continued to "sit" on the motion and issued its order approving the application on April 22, 2020, and then found NOPEC's motion to be moot.[23] On brief, the

[23] Order (R. 43 at 8). On brief, the Commission makes the technical argument that it did not "deny" the motion to compel, but its issuance of the order approving FirstEnergy's application made the motion "moot." The Commission parses words. By issuing its order approving the application, the Commission effectively denied the motion to compel. PUCO Merit Brief at 4. As stated above, the Commission had no intention of granting the motion because it believed going to hearing would delay FirstEnergy Advisors' entry into the competitive market, to its "undue prejudice."

Commission now acknowledges its error and agrees that the 90-day timeframe was tolled by the COVID-19 related Emergency Orders.[24] See *In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings during the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC, Entry (March 16, 2020). Appx. at 208. The toll was lifted on June 1, 2020 (Id., Entry (May 20, 2020) (Appx. at 213) and the PUCO could have permitted discovery, held a hearing and issued an order by the September 1, 2020 deadline. On brief the Commission asserts that it was still permitted to operate within the original 90-day period. PUCO Merit Brief at 14-15. The Commission misses the point. It had more than ample time to address the material issues of shared management and brand name. It didn't. It issued its order early because of its partiality: it chose not to risk "prejudice" to FirstEnergy Advisors by delaying its entry into the market. In doing so, it disregarded the risk to the eight intervenors in this case, and the market in general, by permitting FirstEnergy Advisors to operate in violation of law. Indeed, the Commission's concern with delaying FirstEnergy Advisors' entry into the market by litigating the code of conduct issue is inconsequential. The allegations and available evidence were sufficient enough that, if the 90-day timeline could not be met, the application should have been denied. A delay for necessary hearing pales in comparison to the alternative, proper remedy of denying the application.

In support of its erroneous claim that the Commission has the discretion to delay discovery until it sets a procedural scheduled, FirstEnergy Advisors relies on two discovery rules. O.A.C. 4901-1-17(A) (Appx. at 262) provides that "discovery *may* begin immediately after a proceeding is commenced and should be completed as expeditiously as possible," and O.A.C. 4901- 1-16(B) (NOPEC Appx. 260) provides that "any party to a commission proceeding

[24] PUCO Merit Brief at 14.

*may* obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding." Emphasis supplied. FirstEnergy Advisors claims that the "consistent use of the word 'may' reveals that the Commission did not intend for discovery to be an automatic right in all cases; rather, *the Commission* has the discretion to allow discovery in certain proceedings where necessary." FirstEnergy Advisors Merit Brief at 16 (emphasis supplied). FirstEnergy Advisors misreads the rules. The use of the word "may" relates to the discretion of the parties to commence and obtain discovery, not the Commission's ability to grant the right. The Commission's interpretation of the rule confirms as much, as discussed above. See, *e.g.*, *Columbia*, Entry (January 27, 2012) at 3-4 (Appx. at 228).

FirstEnergy Advisors also attempts to bolster its argument that discovery is discretionary by noting that the Commission doesn't permit discovery in rulemaking cases. FirstEnergy Advisors Merit Brief at 19. FirstEnergy Advisors fails to understand that the commission has quasi-legislative (rulemaking) powers[25] as well as quasi-judicial (hearing) powers.[26] It is elementary that discovery and hearing are not a part of the legislative or quasi-legislative process.

### D. The Commission's order and entry on rehearing violate R.C. 4903.09 because they never explain how the facts of this case meet the requirements of R.C. 4928.08(B) and O.A.C. 4901:1-24-10(C).

In contested proceedings such as this, R.C. 4903.09 (Appx. at 240) requires the Commission to make findings of facts, and provide rationale based upon those facts, to support its decision. The Commission blatantly failed to do so in this case, by relying solely on Staff's two-paragraph recommendation, which itself made no factual findings. On brief, the Commission and FirstEnergy Advisors recognize the Commission's failure, and cite case law

[25] See, e.g., R.C. 4903.13 (Appx. at 241), 4928.06(A) (Supp. Appx at 141).
[26] See, *e.g.*, R.C. 4903.02 (Supp. Appx at 137), 4905.26 (Appx. at 242).

that attempts to excuse strict compliance with the terms of the statute.[27] See. *e.g.*, *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 32. See, also, *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209, 638 N.E.2d 516 (1994) (The Commission need only provide enough detail in its orders to allow the Court to determine the basis of the PUCO's reasoning.). The Commission's order in this proceeding fails to meet even this low bar.

Appellees argue that the Commission's only determination in this case is whether FirstEnergy Advisor's managers and officers were managerially capable of providing service, *e.g.*, they had sufficient experience, training and/or education. However, even accepting that narrow standard as true (which it isn't), the Commission's order never addresses how it arrived at its decision, or how the facts of this case meet the standards or O.A.C. 4901:1-24-10(C). Appx. at 252). Rather the order engages in generalities, *e.g.*, that Staff conducted a thorough review of the application; and that the Commission reviewed the application, Staff's recommendation and the pleadings in the case. On brief, the Commission admits as much, by justifying its compliance with R.C. 4903.09 as follows:

> In evaluating an application for certification of [FirstEnergy Advisors] as a CRES provider, the Commission considered the information contained in the application, supporting attachments and evidence, and recommendations of Staff. Suvon Cert. Case, Entry on Rehearing at ¶28, OCC App. at 27. After reviewing this information, the Commission found that the PUCO Staff "thoroughly reviewed Suvon's managerial, technical and financial capability," and the Commission approved Suvon's application. Suvon Cert. Case, Finding and Order at ¶21, 27, OCC App. 12-13, 14. Thus, the Commission's rationale and record support establish that no violation of R.C. 4903.09 exists. [PUCO Merit Brief at 20.]

In addition, FirstEnergy Advisors believes that, because no facts are recited to support the Commission's reasoning, it is sufficient that its application, as supplemented, provided ample

[27] PUCO Merit Brief at 18; FirstEnergy Advisors Merit Brief at 23.

information to support the Commission's order. FirstEnergy Advisors Merit Brief at 24. The problem with FirstEnergy Advisor's analysis is that it would require this Court to make an independent review of the application and pleadings. The Court has long recognized that the purpose of R.C. 4903.09 is "to enable this court to review the action of the commission without reading the voluminous records in Public Utilities Commission cases." *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 311, 513 N.E.2d 337 (1987) ("*MCI*") quoting *Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, 156 Ohio St. 360, 363, 102 N.E.2d 842 (1951). The Commission's order is unlawful because it violates this standard.

As stated previously, the issue in this case is not so narrowly framed as the Commission would have it. The issue is whether FirstEnergy Advisors' and the FirstEnergy EDUs' sharing of employees violates the code of conduct. If so, the EDU employees cannot be employed by FirstEnergy Advisors. Without having named legitimate non-EDU employees to operate the company, FirstEnergy Advisors' application must fail. Appellants argue that the Commission factually resolved this issue by finding that it has routinely permitted the sharing of employees. This argument is disingenuous. While some sharing is permitted, Appellees, and even the Commission, admit that the sharing of employees is not permissible when it violates the code of conduct.[28] See O.A.C. 4901:1-37-04(A)(4). Appx. at 255. The Commission made no factual finding whether the sharing in this case violated the code of conduct, because it punted the question to the audit case. Because it made no finding on this material issue, its order approving FirstEnergy Advisors' application violates R.C. 4903.09. Appx. at 240.

Similarly, Appellees on brief claim that the Commission found that it has permitted EDUs and affiliates to use the same brand name. Again, the Commission's punting this open,

[28] PUCO Merit Brief at 9, 16; FirstEnergy Advisors Merit Brief at 21-22; Entry on Rehearing (R. 49 at 4).

material issue to the audit case belies Appellees' argument. The Commission failed to find in this proceeding whether use of the FirstEnergy brand name violates O.A.C. 4901:1-37-04(D)(7). If there is a violation, the Commission cannot find that FirstEnergy is compliant with the Commission's rules and orders and its application must be denied.

FirstEnergy Advisors also attempts to distinguish *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 708 N.E.2d 1255 (1999) ("*Tongren*"). FirstEnergy Advisors Merit Brief at 26-27. In *Tongren*, the Court found that the Commission violated R.C. 4903.09 because "…it is impossible to determine what record evidence was considered by the commission other than the conclusion of its Staff and the assertion of factually unsupported conclusions by the companies in the joint application for merger approval." *Tongren,* 85 Ohio St.3d at 91. The same deficiency is at issue in this case. However FirstEnergy Advisors claims that the facts in Tongren are different because Staff's recommendation was based on information not in the record. This is a distinction without a difference. First, by not explaining the basis of its recommendation, the parties have no idea whether Staff's recommendation is based upon information in the record, or is from its off-record, non-public and non-transparent discussions with FirstEnergy Advisors that occurred after the application was suspended. Second, FirstEnergy's argument would require the Court to "go behind" the orders to determination for itself if the information contained in the application, as supplemented, supported the Commission's decision. FirstEnergy Advisors' position violates *MCI*.

FirstEnergy Advisors also attempts to distinguish *In re Duke Energy Ohio, Inc.*, 148 Ohio St.3d 510, 2016-Ohio-7535, 71 N.E.3d 997, ¶ 19 ("*Duke*"). FirstEnergy Advisors Merit Brief at 28. The thrust of *Duke* is, in order for an appellant to be successful on a R.C. 4903.09 claim, the party must show at least three things: "first, that the commission initially failed to explain a

material matter; second, that [the appellant] brought that failure to the commission's attention through an application for rehearing; and third, that the commission still failed to explain itself." *Duke*, 148 Ohio St. 3d at ¶ 19, quoting *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 71.

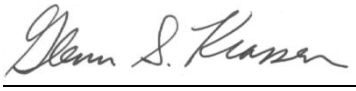
In this proceeding, all three elements are present. First, the Commission (1) approved the application finding only that "no party has raised any issues which materially dispute Staff's determination that [FirstEnergy Advisors] has demonstrated the managerial, technical and financial capability to function as a CRES power broker and aggregator in this state."[29] Second, NOPEC brought to the Commission's attention in it application for rehearing that no findings were made to support its order.[30] Third, the Commission still failed to provide the facts supporting its determination in its entry on rehearing, finding only that it had reviewed the application and pleadings and Staff's recommendation, and that it adopted Staff's recommendation because no party had materially disputed the recommendation (which also contained no findings). Order (R. 43 at 11). The Commission failed to comply with R.C. 4903.09 (Appx. at 240) and the Court should so find.

## III. CONCLUSION

NOPEC respectfully submits that the PUCO's Order is unlawful, unjust and unreasonable. The Order granting FirstEnergy Advisors's certificate to provide CRES should be reversed and this case remanded to the Commission. The Commission should be instructed to hold a hearing to determine whether FirstEnergy Advisors is fit and capable of providing service and complying Commission rules before it is allowed to operate.

[29] Order, April 22. 2020 at 7;
[30] NOPEC Application for Rehearing at 12.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Appellant's Merit Brief was served upon the parties of record this 25th day of January 2021, via electronic transmission.

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