

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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December 3, 2021

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For more than a year and a half, FirstEnergy Advisors (“FEA”) the affiliate of the regulated FirstEnergy electric distribution utilities¹) has provided competitive retail electric broker and aggregation services in Ohio with a certificate granted under questionable circumstances by the PUCO. Without an awareness of FEA’s recent revelation of just how questionable those circumstances were, the Ohio Supreme Court nonetheless found that the PUCO violated the law in granting FirstEnergy Advisors a certificate.²

It was only recently, on November 2, 2021, that FirstEnergy Advisors disclosed shocking text messages revealing apparent ex parte communication with the former Chair of the PUCO regarding this case.³ In one text message, former VP Dennis Chack asked about the status of the FEA energy license: “Any luck on talking with Sam on energy license [W]e just received request for additional comments” (March 3, 2020)

¹ Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating Company (“FirstEnergy utilities”)
² *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630, at ¶¶ 27, 33.
³ See FirstEnergy Advisors’ Motion to Withdraw the Certification Application (Nov. 2, 2021), Exhibit A (text messages between Dennis Chack (then President of FirstEnergy Advisors) and Charles Jones (then CEO and President of the FirstEnergy utilities)).

The next day former FirstEnergy CEO Charles Jones replied to Dennis Chack saying that the former PUCO Chair:

[W]ill 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. (Emphasis added) (See Attachment)

Addressing these text messages in its Motion to Withdraw its Application, FirstEnergy Advisors wrote:

Filing a new CRES certification application will avoid any appearance of impropriety that may be associated with recently released text messages that suggest communication between FirstEnergy Corp.'s former CEO and the former PUCO Chair related to FirstEnergy Advisors' pending certificate. (See FEA Memorandum attached to Motion to Withdraw its Application, p. 6.)

These shocking revelations should not be swept under the rug through a change of cases at the PUCO.⁴ But just *seven business hours* after FirstEnergy Advisors' filed its Motion to Withdraw its application and before any party could oppose it, the PUCO catered to FEA's approach by granting its motion and closing this case.⁵

FirstEnergy Advisors intends to refile for a certificate in a new case without the record of its tainting of this case. As stated, FirstEnergy Advisors claimed that a new case will provide a "fresh start" and allegedly "avoid any appearance of impropriety...."⁶ But that's impossible now.

⁴ NOPEC filed a motion on October 20, 2021, requesting that the PUCO dismiss this case and require FEA to file a new application. FEA's response was due November 4, 2021. Instead of responding (which denied NOPEC the right of a reply), FEA filed its Motion to Withdraw its Application on November 2, 2020. For the first time, it revealed the bombshell text messages between Chack and Jones implicating the PUCO's decision-making process in approving FEA's certification application. More than anything else, FEA's Motion to Withdraw its Application is an attempt to "start fresh" and escape accountability for its obviously questionable conduct. This case should not be dismissed, but held open to resolve the extent of FEA's culpability. Had the PUCO not rushed to dismiss NOPEC's motion as "moot" in the Remand Order, NOPEC would have so explained on reply.

⁵ PUCO Order on Remand (Nov. 3, 2021) ("Remand Order").

⁶ Motion to Withdraw the Certificate Application of FirstEnergy Advisors (Nov. 2, 2021)("Motion to Withdraw"), at 6.

A refiling would be a *false* start, not FEA's claimed "fresh start." FirstEnergy Advisors' approach caters to a cover-up. The PUCO should not indulge it and should rehear its decision.

R.C. 4903.10 permits the filing of an application for rehearing for the PUCO to "abrogate or modify" an order. O.A.C. 4901-1-35 also allows for applications for rehearing. Accordingly, the PUCO's Remand Order is unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by denying OCC and NOPEC the opportunity to respond to FirstEnergy Advisors' motion to withdraw its application and its revelation of tainted text messages, in violation of O.A.C. 4901-1-12(B)(1).

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by closing this case. To the detriment of due process for the parties/appellants OCC and NOPEC, the Remand Order allows FirstEnergy Advisors the "fresh start" it sought in its motion to allegedly avoid the "appearance of impropriety" in the tainted text messages it belatedly filed. But in reality the PUCO's allowance of FEA's so-called fresh start and its closing of the case have foreclosed due process and a record for important regulatory actions that are needed for consumer protection in light of FEA's revelation of some relationship with the former PUCO Chair. As reflected in our other assignments of error, closing the case impedes such PUCO considerations as: rescinding FEA's certificate without renewal for five years; requiring a belated filing of ex parte information required under law and rule; disgorgement of FEA profits; and FEA's payment of forfeitures.

ASSIGNMENT OF ERROR NO. 3: The PUCO erred (under R.C. 4928.08(D)) by failing to "rescind" or "conditionally rescind" FirstEnergy Advisors' certificate for at least five years based on the tainted text messages that reflect how FEA "failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state."

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by failing to require FirstEnergy Advisors (in violation of R.C. 4903.081) to belatedly file "a full disclosure of the communication" that it revealed in tainted text messages. And the PUCO erred by failing to require FirstEnergy Advisors (in violation of O.A.C. 4901-1-09) to belatedly file "a document identifying all the participants and the location of the discussion, and fully disclosing the communications made."

ASSIGNMENT OF ERROR NO. 5: The PUCO erred by failing to require FirstEnergy Advisors to disgorge any profits it collected while providing broker and aggregation services in Ohio with a certificate that the PUCO granted under questionable circumstances including a violation of R.C. 4903.081 (ex parte prohibitions) and violation of corporate separation regulations as revealed in the FirstEnergy Advisors' filing of tainted text messages.

ASSIGNMENT OF ERROR NO. 6: The PUCO erred by failing to require FirstEnergy Advisors to pay forfeitures under R.C. 4905.54 for a violation of R.C. 4903.081 (ex parte prohibitions) and violation of corporate separation regulations as revealed in the FirstEnergy Advisors' filing of tainted text messages.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Remand Order as requested by OCC and NOPEC.

Respectfully submitted,

/s/ Dane Stinson

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

For more than a year and a half, FirstEnergy Advisors has provided competitive electric broker and aggregation services in Ohio under a certificate that was found by the Ohio Supreme Court to have been unlawfully approved by the PUCO.⁷ After the Ohio Supreme Court reversed and remanded the PUCO’s order approving the certificate, FirstEnergy Advisors filed a motion to withdraw its certificate application.⁸ Attached to FirstEnergy Advisors’ motion were shocking text messages showing what FirstEnergy Advisors understatedly described with the words “appearance of impropriety” about seeming ex parte communications with the former Chair of the PUCO.

Exhibit A to FirstEnergy Advisors’ motion to withdraw reveals text messages from early March 2020 – while FirstEnergy Advisors’ certificate application was pending before the PUCO. The messages were between Dennis Chack (then President and Manager of FirstEnergy Advisors) and Charles Jones (then CEO of FirstEnergy Corp., Manager of FirstEnergy Advisors, and Director of the FirstEnergy utilities). These text messages seemingly show that then CEO

⁷ 2021-Ohio-3630, at ¶¶ 4, 27, 33.

⁸ See Motion to Withdraw the Certification Application of Suvon, LLC d/b/a FirstEnergy Advisors as a Competitive Retail Electric Service Power Broker and Aggregator (Nov. 2, 2021) (“Motion to Withdraw”).

Jones engaged in improper ex parte communications⁹ with the former chair of the PUCO on the subject of the “energy license.” The text messages reveal the following exchange between

Charles Jones and Dennis Chack:

Dennis Chack [March 3, 2020]: Any luck on talking with Sam 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. (Emphasis added)

Dennis Chack: OK thanks for discussing with him. ***¹⁰

So one issue is the seeming ex parte violations of R.C. 4903.081 and O.A.C. 4901-1-09. But these text messages also demonstrate the lack of corporate separation (in violation of R.C. 4928.17 and other regulations) involved.

Within *seven business hours* of FirstEnergy Advisors’ service of its motion to withdraw and its disclosure of the shocking text messages, the PUCO issued its Remand Order granting FirstEnergy Advisors’ motion to withdraw and closing the record.¹¹ The Remand Order made no mention of the text messages and denied the intervening parties in this case (including OCC and NOPEC) their opportunity to respond to FirstEnergy Advisors, under O.A.C. 4901-1-12.

And while FirstEnergy Advisors operated for a year and a half providing competitive broker and aggregation service in Ohio under a certificate later held to be unlawful, the Remand Order allows FirstEnergy Advisors to keep all profits it collected. There were no repercussions for FirstEnergy Advisors’ bad acts.

⁹ See R.C. 4903.081 and Ohio Admin. Code 4901-1-9.

¹⁰ FirstEnergy Advisors’ Motion to Withdraw, Exhibit A.

¹¹ Remand Order, at ¶10.

The result is unreasonable and unlawful, as we describe in our assignments of error. The PUCO should abrogate or modify the Remand Order, under R.C. 4903.10, to address these issues.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by denying OCC and NOPEC the opportunity to respond to FirstEnergy Advisors' motion to withdraw its application and its revelation of tainted text messages, in violation of O.A.C. 4901-1-12(B)(1).

The reason the case is on remand is the PUCO's violation of process rights for OCC and NOPEC, as determined by the Ohio Supreme Court. Here we go again.

In the interest of consumer protection, the PUCO should modify the Remand Order to provide parties the opportunity to respond to FirstEnergy Advisors' motion including the text messages it disclosed in its motion to withdraw. The Ohio Administrative Code expressly state that after a party files a motion, parties may file a memorandum contra within fifteen days.¹² But here, parties had no opportunity to file a memorandum contra to respond to FirstEnergy Advisors' motion to withdraw. That's because the PUCO rushed its issuance of the Remand Order – *within only seven business hours*. That violates the Ohio Administrative Code and due process.

Further, although the PUCO or attorney examiner may “issue an expedited ruling on any motion, with or without the filing of memoranda . . .”, they may do so only “where the issuance of such a ruling will not adversely affect a substantial right of any party.”¹³ Here, the substantial rights of parties will be adversely affected by being denied the opportunity to respond to the FEA motion and its disclosure of seeming ex parte communications with the former PUCO chair.

¹² Ohio Admin. Code 4901-1-12(B)(1).

¹³ Ohio Admin. Code 4901-1-12(F).

Failure to recognize and hold FEA accountable for probable rules violations will have an adverse effect on Ohio's competitive retail electric market in Ohio and consumers' confidence in the PUCO.

The PUCO should modify its Remand Order.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by closing this case in violation of R.C. 4903.09. To the detriment of due process for the parties/appellants OCC and NOPEC, the Remand Order allows FirstEnergy Advisors the “fresh start” it sought in its motion to allegedly avoid the “appearance of impropriety” in the tainted text messages it belatedly filed. But in reality the PUCO’s allowance of FEA’s so-called fresh start and its closing of the case have foreclosed due process and a record for important regulatory actions that are needed for consumer protection in light of FEA’s revelation of some relationship with the former PUCO Chair. As reflected in our other assignments of error, closing the case impedes such PUCO considerations as: rescinding FEA’s certificate without renewal for five years; requiring a belated filing of ex parte information required under law and rule; disgorgement of FEA profits; and FEA’s payment of forfeitures.

The reason the case is on remand is the PUCO’s violation of process rights for OCC and NOPEC, as determined by the Ohio Supreme Court. Here we go again.

The PUCO’s Remand Order closing the case violates R.C. 4903.09. That statute requires the PUCO to make a “complete record” “in all contested cases.” The Remand Order is also contrary to transparency for PUCO regulation (and FirstEnergy Advisors’ own calls for “transparency.”) By closing the case and record, parties contesting FirstEnergy Advisor’s ex parte communications and other issues have no opportunity to respond and have been denied due process.¹⁴

FirstEnergy Advisors initially filed its certificate application in January 2020, before the H.B. 6 scandal broke. The certificate application was also filed before FirstEnergy admitted reasons why it paid the former chair of the PUCO over \$4 million. From the beginning in this

¹⁴ See e.g. *Village of Harbor View v. Jones*, 2010-Ohio-6533, ¶ 36 (Administrative hearings must comport with the requirements of due process including the opportunity to be heard and respond.)

case, FirstEnergy Advisors aggressively fought all efforts to “thoroughly review and evaluate”¹⁵ the application by opposing parties’ interventions and requests for discovery.¹⁶

The timing of the Remand Order (rushed within seven business hours of FEA’s text messages disclosure) denied parties the opportunity to respond. The Remand Order closed the case. As reflected in our other assignments of error, closing the case impedes such PUCO considerations as: rescinding FEA’s certificate without renewal for five years; requiring a belated filing of ex parte information required under law and rule; disgorgement of FEA profits; and FEA’s payment of forfeitures. The PUCO should not sweep these issues under the rug by closing the record and denying parties their due process rights and right to a record under R.C. 4903.09. The PUCO should modify the Remand Order.

ASSIGNMENT OF ERROR NO. 3: The PUCO erred (under R.C. 4928.08(D)) by failing to “rescind” or “conditionally rescind” FirstEnergy Advisors’ certificate for at least five years based on the tainted text messages that reflect how FirstEnergy Advisors “failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state.”

FirstEnergy Advisors revealed apparent violations of corporate separation law (R.C. 4928.17) intermingled apparent violations of ex parte law (R.C. 4903.081 and O.A.C. 4901-1-09). In light of these issues, the PUCO erred by failing to rescind or conditionally rescind the certificate for FirstEnergy Advisors for a period of five years (meaning no operations in Ohio for five years). Under R.C. 4928.08(D), the PUCO may rescind FirstEnergy Advisors’ certificate to

¹⁵ FirstEnergy Advisors’ Motion to Withdraw, Memorandum in Support, at 6.

¹⁶ See e.g. Case No. 20-103-EL-AGG, FirstEnergy Advisors’ Memoranda Contra Motions to Intervene by Palmer Energy Company, Inc. (March 9, 2020), Energy Professionals of Ohio (March 9, 2020), Retail Energy Supply Association (April 1, 2020), IGS Energy (April 9, 2020); see also FirstEnergy Advisors’ Motion for Protective Order (March 17, 2020); FirstEnergy Advisors’ Memorandum Contra NOPEC’s Motion to Compel (April 6, 2020); and OCC Motion to Compel (April 17, 2020).

operate in this state if it determines that it “has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state.” FEA fails this standard.

Banning FirstEnergy Advisors’ from providing competitive broker and aggregation service and any service for a period of five years is appropriate given the totality of what has transpired. The FEA-filed text messages reveal anticompetitive, unfair, deceptive, and unconscionable acts or practices, in violation of law. The PUCO should modify the Remand Order.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by failing to require FirstEnergy Advisors (in violation of R.C. 4903.081) to belatedly file “a full disclosure of the communication” that it revealed in tainted text messages. And the PUCO erred by failing to require FirstEnergy Advisors (in violation of O.A.C. 4901-1-09) to belatedly file “a document identifying all the participants and the location of the discussion, and fully disclosing the communications made.”

R.C. 4903.81 prohibits ex parte communications between a commissioner and any party to a formal, docketed proceeding. The exception is unless all parties and intervenors have been notified and given the opportunity of being present, or a full disclosure of the communication is made as it pertains to the subject matter of the case. Ohio Admin. Code 4901-1-09 imposes the duty upon the party holding the discussion to provide notice or make the required full disclosure in a document identifying all the participants and the location of the discussion, and fully disclosing the communications made.

This proceeding was formally docketed on January 17, 2020. Ex parte communication apparently occurred thereafter between FirstEnergy and the former PUCO Chair. Per the text message, the communication involved the certificate application pending in this case.¹⁷ No notice was provided. Further, no disclosure was filed in this docket as to the contents of the

¹⁷ Motion to Withdraw, Exhibit A.

communication. The *ex parte* requirements in law and rule have seemingly been violated in this case.

This highly relevant *ex parte* information was not disclosed by FirstEnergy Advisors during the original case and not on appeal in the state's highest court. If OCC and NOPEC had not prevailed in the Court, with a remand resulting, the FEA disclosure may never have occurred. Closing this case without further considering the *ex parte* communications and the forfeitures to be assessed for FirstEnergy Advisors' violations is wrong, is bad for the PUCO's administration of justice and bad for public trust of state government regulation of utilities. It would send all the wrong signals. The PUCO should modify the Remand Order.

ASSIGNMENT OF ERROR NO. 5: The PUCO erred by failing to require FirstEnergy Advisors to disgorge any profits it collected while providing broker and aggregation services in Ohio with a certificate that the PUCO granted under questionable circumstances including a violation of R.C. 4903.081 (ex parte prohibitions) and violation of corporate separation regulations as revealed in the FirstEnergy Advisors' filing of tainted text messages.

FirstEnergy Advisors has provided competitive electric broker and aggregation service in Ohio for over a year and a half. The Court held that the PUCO violated the law when it approved FirstEnergy Advisors' certificate application.¹⁸ The text messages disclosed by FirstEnergy Advisors show apparent *ex parte* communications with the former chair of the PUCO. That violates R.C. 4903.081 and the PUCO's rules requiring prompt disclosure of *ex parte* communications.¹⁹ The text messages also reveal corporate separation violations.

As such, FirstEnergy Advisors should not be allowed to benefit by keeping profits it collected from consumers during the time it operated under a certificate that had been unlawfully granted. However, the Remand Order unreasonably *rewards* FirstEnergy Advisors by allowing it

¹⁸ 2021-Ohio-3630, at ¶¶ 4, 27, 33.

¹⁹ Ohio Admin. Code 4901-1-09.

to keep its profits and make a “fresh start” in a new case. Reading the Remand Order, it’s as if the tainted text messages were not disclosed to the PUCO. But they were, and all involved should be held accountable.

The PUCO should grant rehearing and require FirstEnergy Advisors to disgorge any and all profits collected from its competitive broker and aggregation service in Ohio between April 22, 2020 (the date the PUCO approved the certificate) and November 2, 2020 (the date FirstEnergy Advisors filed its motion to withdraw).

ASSIGNMENT OF ERROR NO. 6: The PUCO erred by failing to require FirstEnergy Advisors to pay forfeitures under R.C. 4905.54 for a violation of R.C. 4903.081 (ex parte prohibitions) and violation of corporate separation regulations as revealed in the FirstEnergy Advisors’ filing of tainted text messages.

The PUCO should also abrogate or modify the Remand Order to require FirstEnergy Advisors to pay forfeitures regarding its broker and aggregation operations in Ohio. R.C. 4905.54 permits the PUCO to impose forfeitures of up to \$10,000 per day for FirstEnergy Advisors’ failure to comply with a PUCO order or requirement. In this case, FirstEnergy Advisors operated under its certificate for 560 days (April 22, 2020 through November 2, 2021). Thus, the PUCO should order FirstEnergy Advisors to pay a forfeiture of \$5.6 million.

Forfeitures are appropriate here given FEA’s bad acts as revealed in its filing of text messages. FirstEnergy Advisors wrongly engaged in apparent *ex parte* communications (in a case the Supreme Court overturned for process violations) and violated corporate separation laws. And FirstEnergy Advisors belatedly disclosed the text messages only after the Ohio Supreme Court reversed the PUCO’s order granting the certificate.

The PUCO should grant rehearing and modify the Remand Order to require FirstEnergy Advisors to forfeit profits from its competitive broker and aggregation service in Ohio.²⁰

III. CONCLUSION

The PUCO should grant rehearing and abrogate or modify the Remand Order consistent with the above recommendations. FirstEnergy Advisors should be held accountable to the public, to parties in the case, and to the state utility regulator.

Respectfully submitted,

/s/ Dane Stinson

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²⁰ See R.C. 4928.16(B)(3).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served via electronic transmission upon the parties this 3rd day of December 2021.

/s/ Angela D. O'Brien
Angela D. O'Brien
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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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]
[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.

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Summary: App for Rehearing Application for Rehearing by Office of the Ohio Consumers' Counsel and Northeast Ohio Public Energy Council electronically filed by Ms. Deb J. Bingham on behalf of O'Brien, Angela Ms.