

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Suvon, LLC)
d/b/a FirstEnergy Advisors for Certification as) Case No. 20-103-EL-AGG
a Competitive Retail Electric Service Power)
Broker and Aggregator in Ohio.)

**SUVON, LLC D/B/A FIRSTENERGY ADVISORS’ MEMORANDUM CONTRA THE
APPLICATION FOR REHEARING FILED BY OFFICE OF THE OHIO CONSUMERS’
COUNSEL AND NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

I. INTRODUCTION

Suvon, LLC d/b/a FirstEnergy Advisors (“FirstEnergy Advisors”) opposes the Application for Rehearing of the Commission’s November 3, 2021 Order on Remand filed by the Office of the Ohio Consumers’ Counsel (“OCC”) and Northeast Ohio Public Energy Council (“NOPEC”). This case relates solely to FirstEnergy Advisors’ request to provide brokerage service in the state of Ohio. If FirstEnergy Advisors no longer wishes to pursue its Application there is no reason to continue this proceeding. The Commission’s decision was accordingly correct.

It is also noteworthy that NOPEC’s position on rehearing is inconsistent with its own prior motion. Only days before the Commission’s decision, NOPEC filed a request specifically asking the Commission to dismiss FirstEnergy Advisors’ Application and order FirstEnergy Advisors to file a new application in a new proceeding if FirstEnergy Advisors still wished to provide CRES in Ohio.¹ FirstEnergy Advisors then sought to withdraw its Application just as NOPEC had

¹ See Application for Rehearing, at 2, fn 4 (“NOPEC filed a motion on October 20, 2021, requesting that the PUCO dismiss this case and require [FirstEnergy Advisors] to file a new application.”); *see also* NOPEC Motion to Rescind or Suspend (filed Oct. 20, 2021), at 3, 9 (requesting that the Commission “[d]ismiss this proceeding and require FirstEnergy Advisors to file a new application, if it wishes to provide CRES in the future in this state, in a new proceeding[.]”).

requested, and the Commission properly granted that request. NOPEC's objection now to getting exactly what it asked for then from the Commission lacks merit.

Finally, NOPEC/OCC claim that FirstEnergy Advisors is seeking to thwart Commission review of certain text messages. But NOPEC/OCC ignore that FirstEnergy Advisors disclosed voluntarily the text messages which form the foundation of NOPEC/OCC argument. Far from seeking to thwart Commission or public review, FirstEnergy Advisors identified the text messages and voluntarily publicly disclosed them. There is no requirement that the Commission address those text messages in this case. NOPEC/OCC have failed to identify any authority to the contrary, and their request for rehearing should be denied.

II. ARGUMENT

A. The Commission did not “deny” NOPEC or OCC an opportunity to respond to FirstEnergy Advisors’ Motion. (Response to Assignment of Error No. 1)

In their first assignment of error, NOPEC/OCC argue that the Commission denied NOPEC/OCC an opportunity to respond to FirstEnergy Advisors’ Motion by ruling too quickly. They allege the Commission’s issuance of the Order on Remand upon FirstEnergy Advisors’ Motion was “rushed” and “violate[d] the Ohio Administrative Code and due process,” since NOPEC/OCC were not permitted to respond to the text message revelation in this case. NOPEC/OCC therefore seek a modification of the Order on Remand to provide parties the opportunity to respond to FirstEnergy Advisors’ Motion.²

NOPEC/OCC’s position is not supported by any citation to authority other than OAC 4901-1-12. Nothing in this administrative rule prohibits the Commission from ruling on motions before

² Application for Rehearing by Office of the Ohio Consumers’ Counsel (“OCC”) and Northeast Ohio Public Energy Council (“NOPEC”) at 3.

the briefing cycle is complete. In fact, OAC 4901-1-12 specifically anticipates rulings by the Commission before briefing is complete when no substantial right of any party is affected.³

No substantial right of any party was adversely affected by the Commission's decision. NOPEC and FirstEnergy Advisors agreed that the proceeding should no longer continue and FirstEnergy Advisors should file a new application if it wished to provide CRES service in the future.⁴ The Commission did not need to wait fifteen days before ruling on FirstEnergy Advisors' Motion, as NOPEC had already made its desire known in its October 20, 2021 motion.

Leaving aside the fact that the parties agreed, the Commission "has the inherent authority to manage its own dockets"⁵ and utilize its discretion to decide how "it may best proceed to manage and expedite the orderly flow of its business."⁶ As such, there is no obligation that the Commission wait for every motion to be fully briefed and decided by the Attorney Examiner before ruling on the merits of the case.⁷ This is particularly true where, as here, it would have been meaningless to keep a CRES application proceeding open when the applicant had given notice it no longer wished to proceed. There was no longer a dispute for the Commission to resolve.

NOPEC/OCC's position is also inconsistent with the procedural posture of this case. The Ohio Supreme Court had ruled, and in light of that decision, there was substantial uncertainty about

³ See OAC 4901-1-12(F) ("Notwithstanding paragraphs (B) and (C) of this rule, the commission, the legal director, the deputy legal director, or the attorney examiner may, upon their own motion, issue an expedited ruling on any motion, with or without the filing of memoranda, where the issuance of such a ruling will not adversely affect a substantial right of any party.").

⁴ See NOPEC Motion to Rescind or Suspend at 3, 9; see also FirstEnergy Advisors' Motion to Withdraw the Certification Application (filed November 2, 2021).

⁵ *In re Time Warner Communications of Ohio, L.P.*, Case No. 94-1695-TP-ACE, Entry on Rehearing (Oct. 25, 1995) ("The Commission has the inherent authority to manage its own dockets.").

⁶ *Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982) ("the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort").

⁷ See *In re Implementation of Telecommunications Act of 1996*, Case No. 96-1310-TP-COI, Entry on Rehearing (Nov. 13, 2003) (noting the attorney examiner acted properly "under the authority of Rule 4901-1-12(F) in issuing a ruling without the filing of a memorandum contra" as "there was no need to wait for the filing of a memorandum contra").

the procedural schedule, whether FirstEnergy Advisors could operate while the case was remanded to the Commission, and the statutory deadline by which the Commission was required to rule on the pending application after the case was remanded. As such, it would not have been appropriate for the Commission to wait for the complete briefing cycle to be completed for all parties before issuing its decision.

Once again NOPEC's own statements reveal the flaw in its legal arguments. NOPEC's October 20, 2021 Motion to Immediately Suspend FirstEnergy Advisors' certificate called for the Commission to take immediate action. NOPEC did not call for any period for FirstEnergy Advisors to respond, and instead sought to "immediately" stop FirstEnergy Advisors from communicating with customers. It is likely NOPEC was seeking to stop FirstEnergy Advisors from educating aggregation communities regarding how the NOPEC offer compares to taking default service from the utility or creating their own aggregation program.⁸ Regardless of the reason why NOPEC called for immediate action, NOPEC's own motion shows that the Commission is not always required to have a complete briefing cycle before issuing decisions.

The only alleged substantial right identified by NOPEC/OCC is that they were not permitted to respond to the text messages disclosed by FirstEnergy Advisors. However, NOPEC/OCC never explain why they needed to respond to the text messages in this case or lose a substantial right. FirstEnergy Advisors withdrew its Application and is no longer providing jurisdictional service in Ohio and so that cannot be the cause of any harm. NOPEC/OCC are also not prohibited from referencing the text messages in other proceedings. Indeed, NOPEC/OCC

⁸ As described in detail in the Memorandum Contra filed by FirstEnergy Advisors on November 24, 2021, the NOPEC "standard" offer was more than \$8/MWh higher than the Price to Compare in Ohio Edison and over \$6/MWh higher than the Price to Compare in the Cleveland Electric Illuminating Company. That rate has since increased. See <https://www.nopec.org/residents/pricingrates/electric-pricing/>.

both addressed the text messages at great length in their recent corporate separation comments.⁹ As such, the Commission has not impacted any substantial right that NOPEC/OCC may have.

B. The Commission did not violate any “due process” rights. (Response to Assignment of Error No. 2)

In their second assignment of error, NOPEC/OCC claim that by the Commission closing this case and record, NOPEC/OCC have been denied due process rights.¹⁰ NOPEC/OCC, however, fail to identify any “right” that the Commission violated by granting FirstEnergy Advisors’ Motion. The failure of NOPEC/OCC to identify any substantive due process right mandates that the second assignment of error be denied.

Rather than identifying a due process right, NOPEC/OCC identify a series of actions they would have asked the Commission to take (prohibiting applications for 5 years, requiring additional disclosures, issuing disgorgement, etc.). However, there is no due process right under which NOPEC/OCC can mandate that the Commission address their demands in this case. NOPEC/OCC cite only R.C. 4903.09, a statute which requires “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” Nothing in this statute mandates the Commission to address these demands in this case. NOPEC had not even made those demands at the time the Commission issued its decision. Indeed, it would have been impossible for the Commission to address these new demands since, as explained in detail below, the statutory prerequisites for these findings have not been met. For example, the Commission may not rescind a certificate without notice and opportunity for a hearing, neither of which has taken place here. As such there is no due process violation.

⁹ Case No. 17-974-EL-UNC, NOPEC Comments filed November 22, 2021, p. 1; OCC Comments filed November 22, 2021, p. 33.

¹⁰ Application for Rehearing at 4–5.

This reality does not harm NOPEC/OCC or impact any due process right. NOPEC/OCC can still raise these issues in other proceedings and have already started to do so.¹¹ The Ohio Supreme Court has long made clear that premature opinions like that requested by NOPEC/OCC are not appropriate. “It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.”¹² Accordingly, NOPEC/OCC’s second assignment of error is baseless and must be rejected.

C. The Commission did not err by failing to rescind FirstEnergy Advisors’ application. (Response to Assignment of Error No. 3)

NOPEC/OCC claim that the Commission erred by failing to rescind FirstEnergy Advisors’ application pursuant to R.C. 4928.08(D). R.C. 4928.08(D) allows the Commission to suspend, rescind, or conditionally rescind a certification “if the commission determines, after reasonable notice and opportunity for hearing,” that a company “has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state.”¹³

None of these prerequisites have been met. Therefore, there is no basis for the Commission to suspend, rescind, or conditionally rescind FirstEnergy Advisors’ certificate, and therefore the Commission did not err in failing to do so.

If FirstEnergy Advisors files for certification in the future, its fitness to provide that service under Ohio law can be determined at that time. Indeed, the standard broker application has an entire Section “B” which is expressly devoted to management experience. As such, there is no

¹¹ Case No. 17-974-EL-UNC, NOPEC Comments filed November 22, 2021, p. 1; OCC Comments filed November 22, 2021, p. 33.

¹² Fortner v. Thomas, 22 Ohio St. 2d 13, 14 (1970).

¹³ R.C. 4928.08(D).

need for the Commission to pre-judge an application which may never be filed prior to approving FirstEnergy Advisors' decision to withdraw its Application.

D. The Commission did not err by failing to require additional disclosures regarding the alleged ex parte communications. (Response to Assignment of Error No. 4)

In their fourth assignment of error, NOPEC/OCC claim that the Commission erred by failing to require additional disclosures pursuant to OAC 4901-1-09 regarding the alleged ex parte communications.

OAC 4901-1-09 prohibits commissioners or attorney examiners assigned to a case from discussing the merits of the case.¹⁴ Only upon the actual occurrence of an ex parte discussion is any obligation imposed upon a party participating in the discussion to provide notice or to fully disclose the communications made.¹⁵ Here, it is unclear from the text messages whether there was any ex parte communication between Mr. Jones and Mr. Randazzo such that any obligation to notice or disclose was imposed upon FirstEnergy Advisors. FirstEnergy Advisors did not attempt to parse the language and find an excuse not to publicly disclose this information. Instead, FirstEnergy Advisors voluntarily, publicly disclosed the text messages. The Commission did not err by failing to order that additional information be provided.

E. The Commission did not err by failing to order a disgorgement or forfeiture. (Response to Assignments of Error No. 5 and No. 6)

In their fifth and sixth assignments of error, NOPEC/OCC argue that the Commission erred by failing to order a disgorgement of FirstEnergy Advisors' profits or order FirstEnergy Advisors to pay forfeitures. Both assignments of error are without merit, as they are again premised upon

¹⁴ See OAC 4901-1-09 ("After a case has been assigned a formal docket number, no commissioner or attorney examiner assigned to the case shall discuss the merits of the case with any party to the proceeding or a representative of a party, unless all parties have been notified and given the opportunity to be present or to participate by telephone, or a full disclosure of the communication insofar as it pertains to the subject matter of the case is made.").

¹⁵ See OAC 4901-1-09 ("When an ex parte discussion occurs, a representative of the party or parties participating in the discussion shall prepare a document identifying all the participants and the location of the discussion, and fully disclosing the communications made.").

incorrect presumptions and unproven and unspecified alleged violations. There has been no notice of alleged violations, no opportunity to respond, and no hearing to justify any disgorgement or forfeiture. As such there is no reason those items were required, as a matter of law, to be addressed in the Commission's Order.

NOPEC/OCC also inaccurately characterize FirstEnergy Advisors' certificate as being "unlawfully" granted to argue that disgorgement of any profits FirstEnergy Advisors collected while it was certified should have been ordered by the Commission. This characterization is incorrect. As explained in the Ohio Supreme Court's decision, the Court merely found that the Commission should have included additional information in its order granting certification that explained its position and reasoning.¹⁶ The Supreme Court did not find that FirstEnergy Advisors was in any way deficient as a broker or that FirstEnergy Advisors Application should not be granted on remand. A procedural deficiency is not grounds for disgorgement of profits.

Finally, NOPEC/OCC argue that the Commission should require FirstEnergy Advisors to pay forfeitures based upon R.C. 4905.54. R.C. 4905.54 allows the Commission to assess a forfeiture for established violations or for failure to comply with an order, direction, or requirement of the Commission.¹⁷ Because NOPEC/OCC can point to no established violation or failure to comply on the part of FirstEnergy Advisors, their argument is baseless. Indeed, there has never been a complaint against FirstEnergy Advisors from any of its customers. As NOPEC has not established, or even correctly alleged, grounds for any forfeiture, the Commission's decision was correct.

¹⁶ See *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator*, Slip Opinion No. 2021-Ohio-3630, at ¶ 27 (the PUCO "failed to provide a reasoned explanation of the basis of its decision" and "failed to identify the facts in the record on which it based its decision").

¹⁷ R.C. 4905.54 ("... the public utilities commission may assess a forfeiture of not more than ten thousand dollars for each violation or failure against a public utility or railroad that violates a provision of those chapters or that after due notice fails to comply with an order, direction, or requirement of the commission that was officially promulgated. Each day's continuance of the violation or failure is a separate offense.").

III. CONCLUSION

For the foregoing reasons, FirstEnergy Advisors respectfully requests that the Commission deny NOPEC/OCC's Application for Rehearing.

Respectfully submitted,

/s/ N. Trevor Alexander

N. Trevor Alexander (0080713)

Kari D. Hehmeyer (0096284)

Benesch Friedlander Coplan and Aronoff

41 South High Street, Suite 2600

Columbus, Ohio 43215

Tel: (614) 223-9363

Fax: (614) 223-9330

talexander@beneschlaw.com

khehmeyer@beneschlaw.com

*Attorneys for Suvon, LLC d/b/a FirstEnergy
Advisors*

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 13th day of December 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander

Attorney for Suvon, LLC d/b/a FirstEnergy
Advisors

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on
12/13/2021 3:44:46 PM**

in

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

Summary: Memorandum Contra the Application for Rehearing Filed by Office of the Ohio Consumers' Counsel and Northeast Ohio Public Energy Council electronically filed by Mr. N. Trevor Alexander on behalf of Suvon, LLC