

**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

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

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).

^[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

^[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

^[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

^[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 give 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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