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August 20, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room
Harrisburg, PA 17120

RE: Application of Suvon, LLC d/b/a FirstEnergy Advisors for Approval to Offer, Render, Furnish, or Supply Electricity or Electric Generation Services as a Broker/Marketer to the Public in the Commonwealth of Pennsylvania; Docket No. A-2020-3020377; **ANSWER OF THE RETAIL ENERGY SUPPLY ASSOCIATION TO SUVON, LLC D/B/A FIRSTENERGY ADVISORS' MOTION TO DISMISS PROTEST**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Answer of the Retail Energy Supply Association to Suvon, LLC d/b/a FirstEnergy Advisors' Motion to Dismiss Protest in the above-captioned matter. Copies of this Answer have been served as indicated on the attached Certificate of Service.

Thank you for your attention to this matter. If you should have any questions, please feel free to call me.

Very truly yours,

Todd S. Stewart
Counsel for EGS Parties

TSS/BRB/das/jld

Enclosure

cc: Per Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL ONLY

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Advisors*



DATED: August 20, 2020

Todd S. Stewart

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Suvon, LLC d/b/a FirstEnergy :
Advisors for Approval to Offer, Render, :
Furnish, or Supply Electricity or Electric : Docket No. A-2020-3020377
Generation Services as a Broker/Marketer to :
the Public in the Commonwealth of :
Pennsylvania :

**ANSWER OF THE RETAIL ENERGY SUPPLY ASSOCIATION
TO SUVON, LLC D/B/A FIRSTENERGY ADVISORS’
MOTION TO DISMISS PROTEST**

The Retail Energy Supply Association (“RESA”)¹, by and through its attorneys, Hawke McKeon & Sniscak LLP, submits pursuant to 52 Pa. Code § 5.61 its Answer to Suvon, LLC d/b/a FirstEnergy Advisors (“FirstEnergy Advisors”) Motion to Dismiss Protest (“Motion to Dismiss”). For the reasons stated herein, RESA requests the Commission consider its Protest to FirstEnergy Advisors’ application which raises technical and financial fitness challenges which may affect both the competitive market and consumer protection concerns. First Energy Advisors can say as many times as it cares-to that RESA had constructive notice via hard copy publications in newspapers throughout the Commonwealth where FirstEnergy Advisor was required to notice its application, but the simple truth is that neither RESA nor its members had actual notice of the filing of the application. In the current era of the COVID-19 pandemic, when most employees of RESA’s

¹ The views expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

member EGSs are under travel restrictions or even have offices located out of state, the idea that publication in a handful of physical newspapers is sufficient notice to RESA's members flouts logic and is against the public policy of the protest process. Further, RESA refutes the accusations of FirstEnergy Advisors that its protest is a "competitive protest" forbidden by 52 Pa. Code § 54.36(b). RESA has not "intentionally misuse[d] this Commission's protest process (nor any other's) by repeated filing of competitive protests" and rather raised legitimate financial and technical fitness concerns with the application. 52 Pa. Code § 54.36(b). For the reasons stated below, RESA requests that the Commission deny FirstEnergy Advisors' Motion to Dismiss and accept RESA's protest *nunc pro tunc*.

I. RESA did not Have Actual Notice That the Application of FirstEnergy Advisors was Filed and the Commission Should Accept its Protest *Nunc Pro Tunc* as it Raises Significant Technical and Financial Fitness Concerns and Mitigating Factors Impacting Actual Notice Require the Commission to Exercise its Discretion to Allow RESA's Protest.

RESA admits that it and its members had technical constructive notice of FirstEnergy Advisors application because it was published in seven newspapers throughout the Commonwealth. Motion to Dismiss ¶ 2. However, neither RESA nor its members had actual notice of the application filed by FirstEnergy Advisors because FirstEnergy Advisors was only required to serve the application on the EDCs within the requested territory and RESA and its members only became aware of the Application on or about July 30, 2020. RESA's Protest *nunc pro tunc* did not dispute this fact when it filed the admittedly late protest to FirstEnergy Advisors' application. Rather, RESA requested the Commission accept its Protest *nunc pro tunc* to address the grave consumer protection and competitive market issues it raised based on the Applicant lacking technical and financial fitness to operate in an ethical manner and in compliance with the Commission's regulations or issues including how FirstEnergy Advisors would operate without unjust subsidization from FirstEnergy Corporation which would impact both the competitive

market and potentially FirstEnergy Corp.'s EDCs' ratepayers. It is telling that First Energy Advisors' Motion focuses almost entirely on the fact that the Protest was late, and barely addresses the merits.

FirstEnergy Advisors cites *Interim Guidelines Regarding Notification by and Electric Generation Supplier of Operation Changes Affecting Customer Service and Contract*, for the proposition that constructive notice was sufficient and recognized by the Commission and that waiver of deadlines based on actual notice is improper when applicants incur the expense of publishing newspaper advertisements. Motion to Dismiss ¶ 6. Citing *Interim Guidelines Regarding Notification by and Electric Generation Supplier of Operation Changes Affecting Customer Service and Contract*, Docket No. M-00960890F.0013 (August 14, 1998). Motion to Dismiss ¶ 6. The rulemaking at Docket No. M-00960890F.0013 does not address RESA's Protest *nunc pro tunc* and the claim that it speaks to constructive notice being sufficient is unwarranted as applied to EGS applications. Further, since that Order, the Commission changed such requirements for the transfer and abandonment of an EGS license and codified them at 52 Pa. Code § 54.41. M-00960890F.0013 is of no relevance here.

There are factors, however, that provide comparable value on the issue of granting a late-filed Protest, in applications *by public utilities*, which were set forth in *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH*, Docket Nos. A-212285F0096 *et al.* (Order entered May 9, 2002) (*Pennsylvania American*). In that case, the Commission set forth four standards governing the acceptance of late-filed protests in public utility application:

1. Does the petitioner have a reasonable excuse for missing the protest due date?
2. Was the proceeding contested at the time of the filing of the protest?
3. Will the receipt of the late filed protest delay the orderly progress of the case?

4. Will the late filed protest significantly broaden the issues or shift the burden of proof?

Pennsylvania American. See also Re S.T.S. Motor Freight, Inc., 54 Pa. P.U.C. 343 at 344; *Application of Artesian Water of Pennsylvania*, Docket No. A-210111F0003, Opinion and Order (Order entered June 24, 2004). This standard has been applied and used to govern the acceptance of late-filed protests for Motor Carrier, Water, Natural Gas, and Electric public utility applications which are also published in the Pennsylvania Bulletin as well as in other formats pursuant to 52 Pa. Code § 5.14. However, FirstEnergy Advisor's application was for an electric generation supplier license to be a Marketer/Broker under Chapter 54 – Electricity Generation Supplier Licensing which are not published in the Pennsylvania Bulletin as they are not applications to provide public utility service. See 52 Pa. Code § 5.14. RESA alleges under the extra ordinary circumstances and timing of First Energy Advisors Application that RESA has good cause for its Protest *nunc pro tunc* to be accepted by the Commission.

The first comparable factor of the Commission's test as applied to late-filed protest in applications by public utilities is whether petitioner has a reasonable excuse for missing the protest date. *Pennsylvania American*. As stated in its Protest, RESA became aware of the Application on or about July 30, 2020. Unlike applications to provide public utility service, EGS licenses are only required to be published in newspapers of general circulation and the Commission does not publish EGS applications in the Pennsylvania Bulletin. RESA and its members have good cause for and reasonable excuse for missing the protest date: normal business operations have been unprecedentedly disrupted by the COVID-19 Pandemic, making a mere physical newspaper notice insufficient to inform interested parties and provide actual notice. RESA and its members as well as the Commission are operating in ways never before used and adjusting to the remote working world of COVID-19. Most employees of EGSs, like most people everywhere, are under travel

restrictions and remote working procedures, sometimes outside the Commonwealth. The idea that RESA and its members have easy access to physical newspapers to review for applications such as FirstEnergy Advisors' is untenable. While technically RESA and its members had constructive notice of the application, under the circumstances RESA and its members did not have actual notice that the application was filed – unlike the applications of public utilities published in the Pennsylvania Bulletin. Therefore, RESA has good cause for its Protest *nunc pro tunc*.

The second comparable factor of the Commission's test as applied to late-filed protest in applications by public utilities is whether the proceeding was contested at the time of the filing of the protest. RESA concedes that no other protest was filed against FirstEnergy Advisors application to date. Indeed, the implications of the COVID-19 Pandemic may very well have been a factor in limiting other protests. RESA requests that pursuant to the Commission's March 20, 2020 Order Permitting Modifications to Administrative Deadlines, Procedural Rules for Commission's Filing and Service Requirements, Docket No. M-2020-3019262, this factor be liberally construed and that RESA's protest be accepted *nunc pro tunc* as RESA raised significant technical and financial fitness issues in FirstEnergy Advisors' application.

The third factor, whether receipt of the late-filed protest will delay the orderly progress of the case is answered in the negative. At the time of filing, discovery by Commission Staff was still ongoing. *See RESA Protest* ¶ 4. As the application is still under active review by the Commission, no undue delay in its approval will occur. That the Commission may consider and investigate the issues raised by the protest should not be weighed against RESA as delaying the proceeding, but rather as a positive in that the Protest raised issues that staff perceived as worthy of investigation that otherwise may have been overlooked.

The final factor, whether the late protest will significantly broaden the scope of the proceeding or shift the burden of proof is also answered in the negative. RESA raises issues with

FirstEnergy Advisors' technical and financial fitness, issues at the very core of the application and this proceeding. FirstEnergy Advisors remains the party with the burden of proof to prove that it is both technically and financially fit to operate as an EGS. Therefore, RESA's protest *nunc pro tunc* does not broaden the scope of the proceeding or shift the burden of proof.

Based on the extraordinary operating conditions that the COVID-19 Pandemic has placed on both the Commission and the regulated community, RESA requests that its Protest *nunc pro tunc* be accepted and reviewed by the Commission to address the technical and financial fitness concerns alleged therein. This request is based on the fact no undue delay of the application will occur as Commission Staff are still pursuing discovery regarding the application and thus considerations of the Application are still on going. Further, under the circumstances, technical constructive notice did not provide RESA or its members actual notice of the application to timely file its protest to the technical and financial fitness of FirstEnergy Advisors ability to operate.

II. RESA has not Misused the Protest Process as it Raised Significant Financial and Technical Fitness Challenges to FirstEnergy Advisors Application.

FirstEnergy Advisors allege RESA's Protest *nunc pro tunc* should be dismissed as "a competitive protest, which is forbidden by the PUC's regulations. 52 Pa. Code § 54.36(b)." Motion to Dismiss ¶ 22. 52 Pa. Code § 54.36(b) provides:

(b) Protests may challenge only the applicant's financial and technical fitness to provide the service for which a license is requested. Consistent with the requirements of due process, sanctions, such as revocation or suspension of a supplier's license or the imposition of a fine, may be imposed on parties who intentionally misuse the protest process by repeated filing of competitive protests.

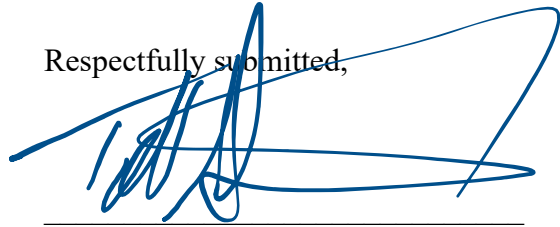
RESA submits that its Protest *nunc pro tunc* only challenged the financial and technical fitness of FirstEnergy Advisors to provide the service requested. RESA has not in any way misused the protest process by raising the financial and technical fitness issues in its Protest *nunc pro tunc* nor has it repeatedly filed competitive protests. If there are "competitive" elements to the protest, they are squarely focused on potential violations of Commission Regulations, as suggested by the dearth of information in First Energy Advisors' application, not simply trying to bar the door to a competitor entering the market. Indeed, such an accusation is baseless and inflammatory.² RESA's protest raises legitimate issues with First Energy Advisor's application and its ability to operate.

III. Conclusion

WHEREFORE, RESA respectfully requests that the Pennsylvania Public Utility Commission deny FirstEnergy Advisor's Motion to Dismiss Protest and accept RESA's Protest *nunc pro tunc* as RESA and its members lacked actual notice of the application and that the Protest raises legitimate issues with FirstEnergy Advisors' financial and technical fitness to operate in compliance with the Commission's regulations.

² While some RESA members may have filed a protest action in Ohio, such actions are immaterial in Pennsylvania.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'T. Stewart', written over the text 'Respectfully submitted,'.

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DATED: August 20, 2020