BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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	)))))	Case No. 17-0974-EL-UNC

SUPPLEMENTAL REPLY COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

In the Commission's Retail Markets Investigation ("RMI"), the Commission directed Staff to conduct this audit of the policies and procedures of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") related to corporate separation among the Companies and their affiliates, including the Companies' then unregulated generation affiliate FirstEnergy Solutions Corp. ("FES").[1] The corporate separation audits, which the Commission directed for all electric distribution utilities ("EDUs"), were a means of achieving the RMI's objective that a utility's unregulated generation affiliate is not a barrier to robust retail electric competition.

Recently, the Commission solicited supplemental comments after the Companies notified the Commission on March 20, 2020 that FES had emerged from bankruptcy as Energy Harbor Corp. ("Energy Harbor"), a separate and independent company not affiliated with FirstEnergy Corp. As a result, the Companies have no unregulated generation affiliate. Even before Energy Harbor fully separated from FirstEnergy Corp., retail electric competition in the Companies' service territories was robust. Today, retail competition continues to thrive in the Companies'

[1] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, PUCO Case No. 12-3151-EL-COI, Finding and Order at ¶ 16 (Mar. 26, 2014).

service territories.[2] As a result of Energy Harbor's full separation, any perceived barriers to the health, strength and vitality of the retail electric market that this corporate separation audit was intended to address have been eliminated in the Companies' service territories.

The Supplemental Commenters do not address retail electric competition or the full separation of Energy Harbor from the Companies and FirstEnergy Corp. Rather, their supplemental comments focus on issues unrelated to the objectives of the corporate separation audit or the RMI. The Companies will respond to these below. Suffice it to say, none of the supplemental comments change the fundamental facts that the Companies have no unregulated generation affiliate and that competitive retail electric service providers, including most of the Supplemental Commenters, are thriving in the Companies' service territories. There has always been robust retail electric competition in the Companies' service territories, and today no one can credibly contend that a generation affiliate poses a barrier. Consequently, it is time to recognize that the objectives of this corporate separation audit, as directed in the RMI, have been satisfied, and bring this audit to a close.

I. Replies to Supplemental Comments

A. The reasons driving the audit have been addressed.

In evaluating the supplemental comments, it is instructive to revisit this audit's origin. The Commission directed this audit as a result of its RMI, which the Commission initiated to investigate the health, strength and vitality of Ohio's competitive retail electric service market.[3] The Commission's objective was to protect retail electric customers against market power.[4]

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[2] *See* Supplemental Comments of Vistra Energy Corp. ("Vistra") at 2, n.2. Other supplemental commenters in this proceeding are: The Retail Energy Supply Association ("RESA"), Office of the Ohio Consumers' Counsel ("OCC"), Interstate Gas Supply, Inc. ("IGS"), and Northeast Ohio Public Energy Council ("NOPEC"). Collectively, these entities are referred to as the "Supplemental Commenters."

[3] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, PUCO Case No. 12-3151-EL-COI, Entry at 2 (Dec. 12, 2012).

[4] *Id.* at 2, 5.

With respect to corporate separation, the Commission was concerned with structurally separate generation and distribution companies that support the same utility holding company.[5] Indeed, in his Concurring Opinion appended to the Commission's March 26, 2014 Finding and Order in the RMI – the Finding and Order directing corporate separation audits – then-Chairman Snitchler shed light on this audit's purpose, by explaining that it is a "skepticism around structural separation" that necessitates enforcement of codes of conduct:

> In the transition from regulated, vertically integrated utilities to restructured, competitive business units (each of which has a vested interest in the success of the other) a full separation would eliminate the skepticism around structural separation. What is more, full separation would eliminate the need for enforcement of codes of conduct because two completely separate legal entities, each with its own shareholders, board of directors, and management, would not have a common goal of benefiting the utility holding company.

Thus, when distribution and competitive generation businesses are fully separated, the objectives of corporate separation are met. In fact, Staff had recommended in the RMI that if a corporate separation audit were to demonstrate a failure to comply with corporate separation requirements, the generation affiliate should fully divest. While the Commission declined to adopt this recommendation, it emphasizes that the focus of these corporate separation audits is on structurally separate, unregulated generation affiliates.

When the RMI commenced, the Companies' unregulated generation affiliate was FES, to which the Companies had transferred their generation assets.[6] As of 2013, FES controlled a fleet of physical generation assets,[7] and had over 106 terawatt hours of annual electricity sales,[8] over

[5] *Id.* at 1, 5.
[6] *See generally* FirstEnergy Corp. Form 10-K for Fiscal Year Ended December 31, 2013, *available at* https://www.sec.gov/Archives/edgar/data/1031296/000103129614000010/fe-12312013x10k.htm.
[7] *Id.*
[8] *Id.*

7,000 employees,[9] and 2.7 million retail customers.[10] While FES and the Companies were structurally and functionally separate, and the Companies' service territories had high levels of shopping in 2012,[11] participants in the RMI, including some of the Supplemental Commenters, expressed unfounded concerns that competitive affiliates like FES exercised retail market power as a result of their affiliate status.[12] Thus, in 2014, the Commission ordered corporate separation audits to examine separation between EDUs and their affiliates, and directed that the Companies be audited first.[13] The audit's findings support that the Companies were in compliance with corporate separation requirements even before FES emerged from bankruptcy.

Moreover, as a result of FES's full separation from FirstEnergy Corp. and emergence from bankruptcy as non-affiliate Energy Harbor, the underlying concern of RMI's audit directive, to ensure a generation affiliate presents no barrier to retail electric competition, is fully addressed. The Companies no longer have an unregulated generation affiliate. Further, retail competition in the Companies' service territories continues to thrive. In 2020, 71% of the Companies' customers and 86% of the customers' load shop for their electric generation[14] from 109 certified CRES[15] in the Companies' service territories. Thus, the greater goals of the RMI have been achieved in the Companies' service territories.

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[9] *Id.*
[10] *See* FirstEnergy Corp. Consolidated Report to the Financial Community for Fourth Quarter 2013 (Feb. 25, 2014) *available at* https://www.sec.gov/Archives/edgar/data/1031296/000103129614000007/ex992fe-12312013.htm
[11] As of 2012, 71% of the Companies' customers and 79% of the customers' load were shopping for their electric generation. *See* https://www.puco.ohio.gov/industry-information/statistical-reports/ohio-customer-choice-activity/ (last visited June 10, 2020).
[12] *See, e.g.*, *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, PUCO Case No. 12-3151-EL-COI, Initial Comments of the Retail Energy Supply Association at 3, 18-19 (Mar. 1, 2013).
[13] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, PUCO Case No. 12-3151-EL-COI, Finding and Order at 13 (Mar. 26, 2014).
[14] *See* https://www.puco.ohio.gov/industry-information/statistical-reports/ohio-customer-choice-activity/ (last visited June 10, 2020).
[15] *See* https://www.firstenergycorp.com/content/dam/customer/Customer%20Choice/Files/Ohio/CertifiedSuppliersOH.pdf (last visited June 10, 2020).

The Supplemental Commenters, however, do not comment on retail market power or even retail electric competition. Instead of addressing the reality that the Companies have no unregulated generation affiliate, Supplemental Commenters fixate on issues such as dated organizational charts[16], shared senior officers[17], utility products[18], and a newly certified broker[19] with no generation assets and no retail market presence, much less retail market power. They urge the Commission to focus time and attention on issues outside the Commission's authority, such as the newly certified broker's use of the FirstEnergy trade name.[20] The Supplemental Commenters ignore or have lost sight of the underlying concerns of the RMI that drove the audit, and their latest round of comments do not merit further consideration. It is time for this audit to conclude.

B. It is common and lawful for public utility holding companies to use shared senior officers.

Several Supplemental Commenters raised concerns about the sharing of senior officers between FirstEnergy Corp. and various subsidiaries.[21] These concerns are wholly unfounded. There is nothing unlawful about the use of shared senior officers – the Commission's rules expressly recognize the practical need for shared employees and establish guidelines for properly allocating the shared employees' time and costs and documenting those practices in a cost

[16] *See, e.g.,* RESA Supplemental Comments at 6; IGS Supplemental Comments at 7.
[17] *See, e.g.,* RESA Supplemental Comments at 6; OCC Supplemental Comments at 9; Vistra Supplemental Comments at 16.
[18] *See, e.g.,* RESA Supplemental Comments at 2,8; IGS Supplemental Comments at 2-8.
[19] *See, e.g.,* OCC Supplemental Comments at 2; IGS Supplemental Comments at 1; RESA Supplemental Comments at 2; Vistra Supplemental Comments at 8; NOPEC Supplemental Comments at 1.
[20] *See* OCC Supplemental Comments at 3-6; IGS Supplemental Comments at 10-11; RESA Supplemental Comments at 2; Vistra Supplemental Comments at 8-10; NOPEC Supplemental Comments at 4. As the Companies explained in their Initial Comments in this proceeding, forcing a CRES provider to change its name, as Supplemental Commenters recommend, comes with a host of serious legal problems. *See* Companies' Comments at 12 (Dec. 31, 2018), Companies' Reply Comments at 7 (Jan. 7, 2019). Therefore, it is no surprise that a proposal to do exactly that was previously presented to and soundly rejected by the Commission in Case No. 12-1294-EL-ORD. *See In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service*, Case No. 12-1924-EL-ORD, Finding & Order at p. 18 (Dec. 18, 2013).
[21] OCC Supplemental Comments at 9-12, RESA Supplemental Comments at 6, Vistra Supplemental Comments at 15-16, NOPEC Supplemental Comments at 6.

allocation manual ("CAM").[22] The use of shared senior officers is common among public utility holding companies.

In particular, Supplemental Commenters criticized the sharing of senior officers between FirstEnergy Corp. and its unregulated broker affiliate.[23] This arrangement too is perfectly legal and common in the industry. One need look no further than some of the Supplemental Commenters for examples. RESA members Constellation NewEnergy Inc.[24] and AEP Energy Inc.[25] share senior officers with their ultimate corporate parents. In fact, Vistra and its certified CRES Dynegy Energy Services East, LLC share Vistra's Chief Executive Officer, Chief Operating Officer, President of Vistra Retail, Chief Administrative Officer and General Counsel.[26] Supplemental comments criticizing the Companies' lawful and legitimate use of shared senior officers should be disregarded.

C. The Companies are selling products legally.

In their supplemental comments, IGS and RESA reiterated their complaints about the Companies' sales of products and services other than retail electric service.[27] While IGS asserts the Companies cannot legally sell products and services,[28] the Companies may sell products under their Commission-approved corporate separation plan and tariff, as explained in their

[22] *See* Ohio Adm. Code §§ 4901:1-37-04(A)(5), 4901:1-37-08.
[23] *See, e.g.,* RESA Supplemental Comments at 6; OCC Supplemental Comments at 9; Vistra Supplemental Comments at 16.
[24] *Compare* Renewal Application for Retail Generation Providers and Power Marketers of Constellation NewEnergy Inc., PUCO Case No. 00-1717-EL-CRS, Exhibit A-10 (Oct. 23, 2018) *with* Exelon Corp. "Executive Profiles", *available at* https://www.exeloncorp.com/leadership-and-governance/executive-profiles (last visited June 9, 2020).
[25] *Compare* Renewal Application of AEP Energy, Inc. for Certification as a Retail Generation Provider and Power Marketer, PUCO Case No. 10-0384-EL-CRS, Exhibit A-10 (Mar. 18, 2020) *with* "AEP Leadership", *available at* https://www.aep.com/about/leadership (last visited June 9, 2020).
[26] *Compare* Renewal Application for Retail Generation Providers, Power Marketers, and Aggregators of Dynegy Energy Services (East), LLC, PUCO Case No. 04-1323-EL-CRS, Exhibit A-10 (Feb. 4, 2019) *with* Vistra Energy "Management", *available at* https://www.vistraenergy.com/about/leadership/management/ (last visited June 9, 2020).
[27] IGS Supplemental Comments at 2-6, 8; RESA Supplemental Comments at 2, 4.
[28] IGS Supplemental Comments at 2-5.

Supplemental Comments.[29] The Commission has approved the Companies' corporate separation plan multiple times, most recently in the Companies' fourth ESP, Case No. 14-1297-EL-SSO.

Moreover, the Companies do not discriminate in providing third-party bill access, in accordance with Ohio law. Contrary to IGS's unfounded claim,[30] HomeServe and SmartMart act as agents of the *Companies*, not their affiliate. RESA's arguments to the contrary are simply untrue and are further founded on the false premise that the Companies transferred SmartMart to Suvon.[31] RESA's and IGS's complaints about the Companies' sales of products and services are in direct conflict with Ohio law, unrelated to the new developments on which the Commission solicited supplemental comments, and are far beyond the concerns raised in the RMI that led to this audit proceeding. These supplemental comments should be disregarded in their entirety.

D. The Companies provide the Commission with required updates on their corporate separation activities and compliance. No further update or inquiry is needed.

In accordance with O.A.C. 4901:1-37-08(H), the Companies provide the Commission with annual updates to the Companies' CAM. These updates provide the information required in O.A.C. 4901:1-37-07, including, where appropriate, updates on FirstEnergy Corp.'s organizational structure and affiliates. Not surprisingly, the Audit Report did not identify any issues with, nor make any recommendations about, the Companies' corporate separation plan.[32] As explained previously, the Commission has approved the Companies' corporate separation plan multiple times. There is no need for the Companies to update their corporate separation plan. The

[29] Companies' Supplemental Comments at 3-4.
[30] IGS Supplemental Comments at 6.
[31] RESA Supplemental Comments at 4.
[32] Contrary to Vistra's assertion, the Audit Report's finding of deficiencies with the CAM was based on a misunderstanding as explained in the Companies Comments. *See* Vistra Supplemental Comments at 18; Companies Comments at 14-16.

Supplemental Commenters' requested adjustments to the list of affiliates in the corporate separation plan[33] are immaterial, unnecessary, and not supported by the Audit Report.

II. Conclusion

The RMI objectives that led the Commission to direct Staff to conduct this audit have been achieved, and there has been ample due process in this proceeding. Following the audit of the Companies and the filing of the Audit Report, participants in this proceeding have now had two opportunities to file comments and reply comments. The findings in the Audit Report support that the Companies are in compliance with corporate separation requirements, and neither of the events leading the Commission to solicit supplemental comments changes this conclusion. Continued inquiry into immaterial issues raised by Supplemental Commenters is not an efficient use of Commission or stakeholder resources. The purpose of the RMI has been achieved in the Companies' service territories. It is time for this proceeding to conclude.

The Companies respectfully request that the Commission adopt the findings and recommendations of the Audit Report subject to the Companies' initial Comments, initial Reply Comments, Supplemental Comments, and these Supplemental Reply Comments.

[33] *See* IGS Supplemental Comments at 7; RESA Supplemental Comments at 8; Vistra Supplemental Comments at 18-21; NOPEC Supplemental Comments at 2.

Respectfully submitted,

/s/ Emily V. Danford

Emily V. Danford (0090747)
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
(330) 384-5849
edanford@firstenergycorp.com

Christine E. Watchorn (0075919)
Counsel of Record
FirstEnergy Service Company
100 East Broad Street, Suite 2225
Columbus, Ohio 43215
(614) 437-0183
cwatchorn@firstenergycorp.com
Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplemental Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company were filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 15th day of June 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Emily V. Danford
An Attorney for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

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Summary: Reply Supplemental Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Ms. Emily V Danford on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company