BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37.	)))))	Case No. 17-0974-EL-UNC

INITIAL COMMENTS OF DIRECT ENERGY BUSINESS, LLC AND DIRECT ENERGY SERVICES, LLC REGARDING DAYMARK ENERGY ADVISORS' COMPLIANCE AUDIT

Direct Energy Business, LLC and Direct Energy Services, LLC (collectively, Direct) submit these Initial Comments as directed in the Commission's October 12 and November 12, 2021 Entries.

I. INTRODUCTION

The Commission has invited comments to the Daymark Report.[1] The Daymark Report confirms what Sage Consulting[2] reported almost four years ago—that FirstEnergy has not complied with corporate separation rules and statutes. There is not much to say about Daymark's findings and recommendations that hasn't been said before, both in this docket and several others. The question is no longer whether FirstEnergy has complied with corporate separation rules; the question is what should be done to address documented evidence of non-compliance.

[1] Daymark Energy Advisors, *A Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio* (filed Sept. 13, 2021).

[2] Sage Management Consultants, LLC, *Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio* (filed May 14, 2018).

The latter question has not received much attention, so Direct will focus its comments accordingly.

The Commission has scheduled a hearing in this matter for February 10, 2022. The scheduling order does not disclose the purpose of the hearing, nor is the purpose readily apparent. This is a Commission-ordered *investigation.* No party has a burden of proof because there is nothing to "prove." The Commission has no legal duty to adopt or reject the auditors' findings and recommendations. The Commission's *investigative* authority under R.C. Chapter 4903 is separate and distinct from its *enforcement* authority under R.C. 4905.26, and this distinction is critical. The Commission may "investigate" compliance for any reason or no reason. But the Commission may render findings of non-compliance only in response to a "complaint in writing" by "any person" or "upon the initiative or complaint of the [Commission]."[3] No such complaint has been filed nor any such initiative taken. Until one of those two things happens, there is nothing for the Commission to decide—at a hearing or otherwise.

The current procedural limbo does not mean the Commission must throw up its hands and cancel the hearing. Now that the auditors have completed their investigations, the Commission has information sufficient to commence enforcement proceedings on its own "initiative" by issuing a show cause order. The show cause order should find and direct as follows:

1. The Sage Report and Daymark Report demonstrate reasonable grounds for complaint that FirstEnergy has violated R.C. 4928.17 and O.A.C. Chapter 4901:1-37;

[3] R.C. 4928.18(B).

2. In accordance with R.C. 4928.18 and 4905.26, FirstEnergy is directed to show cause why it should not be found in violation of R.C. 4928.17 and O.A.C. Chapter 4901:1-37;

3. In accordance with R.C. 4903.07, the Daymark Report and Sage Report are accepted as part of the record of this proceeding;

4. In accordance with R.C. 4928.17, FirstEnergy is directed to file an amended corporate separation plan; and

5. An evidentiary hearing on the show cause order and amended corporate separation plan will commence on February 10, 2022.

FirstEnergy cannot possibly claim that issuance of a show-cause order would be unduly prejudicial—to the contrary, a show cause order would provide notice of the violations alleged and burden of demonstrating compliance. Enforcing the corporate separation rules in the manner proscribed by law will help ensure that any actions eventually ordered will withstand appeal. Anyone who thinks that FirstEnergy would not raise procedural irregularities on appeal does not know FirstEnergy.

II. COMMENTS

The comments below address each finding or directive that should be included in the requested show cause order, beginning with findings regarding the admissibility of the audit reports.

A. The audit reports should be accepted as part of the record.

The proceeding thus far has revolved around the audit reports. A show cause order should advise all parties that the audit reports will be part of the record. There is no need to waste precious time at hearing entertaining needless and irrelevant arguments to the contrary.

R.C. 4928.18(B) extends the Commission's investigative authority under R.C. Chapter 4903 to matters involving corporate separation.[4] R.C. 4903.02 confers broad authority to investigate matters "in relation to the affairs of" a public utility. Such investigations may be conducted "either through the public utilities commissioners or by inspectors or employees authorized by it[.]"[5] Consistent with this authority, the Commission authorized and directed third-party auditors to investigate FirstEnergy's compliance with R.C. 4928.17 and O.A.C. Chapter 4901:1-37. The auditors did so and filed written reports. The audit reports are part of the "evidence and proceedings on an investigation" and therefore "shall be received in evidence."[6] A statute governs the admissibility of the audit reports, not any rule of evidence, so arguments for excluding all or portions of the reports on hearsay grounds are baseless.[7] The audit reports must be "received in evidence."

Admitting the audit reports as part of the record would not unfairly prejudice FirstEnergy. To the contrary, the audit reports advise FirstEnergy of the nature of, and bases for, alleged violations of corporate separation rules. A hearing affords FirstEnergy the right to challenge the

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[4] ("Any such examination or investigation by the commission shall be governed by Chapter 4903 of the Revised Code.")

[5] R.C. 4903.02.

[6] Under R.C. 4903.07, "A transcribed copy of the evidence and proceedings on an investigation, or a specific part thereof, shall be received in evidence[.]" This is *not* the same statute that requires "a complete record of all of the proceedings" in "all contested cases." R.C. 4903.09. R.C. 4903.07 is specific to "investigations" and dictates that the investigation itself becomes part of the record. If there is a hearing on the investigation, testimony and exhibits admitted during the hearing must also become part of the record under R.C. 4903.09.

[7] Under Evid. R. 802, hearsay is not admissible "except as otherwise provided" by the Ohio or United States Constitution or "by statute enacted by the General Assembly." Because R.C. 4903.07 requires the admission of investigative material, a hearsay analysis is simply unnecessary.

auditors. It is ultimately the Commission's job—not the auditors'—to determine whether violations occurred and, if so, what should be done to rectify them.[8]

Direct is indifferent to whether the audit reports are received in evidence on the Commission's own motion, through administrative notice, or through some other means. Any method that eliminates any doubt about the admissibility of the reports would be sufficient.

B. The audit reports demonstrate reasonable grounds for complaint.

R.C. 4928.18(B) contemplates enforcement "upon complaint of any person or upon complaint or initiative of the commission" in accordance with R.C. 4905.26. The audit report findings do not need to be proven for the Commission to rely on these findings as the bases for enforcement. If ultimately proven or accepted as true, the audit report findings are sufficient to sustain findings that FirstEnergy violated corporate separation rules.

Unlike a typical complaint case, the auditors responsible for the investigations have no skin in the game. Preserving their professional reputation creates an incentive to investigate fairly and impartially. Their reports are comprehensive, well-documented, and easily understood. Citing the audit reports as grounds for enforcement would give FirstEnergy far more notice of the nature of the alleged violations than respondents in complaint proceedings typically receive.

There is ample reason for the Commission to exercise its enforcement authority, but the Commission has not done so expressly. For the avoidance of doubt, the show cause order should

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[8] The Commission retains the discretion to adopt the auditors' findings and recommendations as its own. The Ohio Supreme Court recently confirmed that the "PUCO can adopt reports prepared by its staff and incorporate them into its order," provided such reports "contain sufficient factual findings and conclusions of law." *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Electric Serv. Power Broker and Aggregator*, 2021-Ohio-3630, ¶ 22. If the Commission may rely on and incorporate the findings of its Staff, it may also incorporate and rely on the findings of a third-party auditor. *See* R.C. 4903.03 (Commission may investigate "through the public utilities commissioners or by inspectors or employees authorized by it[.]").

find that enforcement proceedings are being commenced "at the initiative of the commission" as provided in R.C. 4905.26 and R.C. 4928.18(B).

C. FirstEnergy should be directed to show cause why it should not be found in violation of the corporate separate rules.

The corporate separation rules do not contain a specific enforcement procedure—other than violations are "subject to 4928.18,"[9] which in turn refers to R.C. 4905.26. The latter statute allows the Commission to act on its own "complaint" or "initiative." Show cause orders are a well-recognized method of exercising "initiative" to address suspected violations of Commission rules or statutes, as evidenced most recently in the proceeding to examine FirstEnergy's political and charitable spending.[10]

The current procedural schedule sets a discovery deadline, dates for filing testimony, and an evidentiary hearing.[11] Setting these deadlines does not answer basic questions about the scope of the issues and burden of proof—again, there is no complaint or application in this case staking out a claim for relief. The requested show cause order would settle these issues. Given that "[t]he electric utility has the burden of proof to demonstrate compliance" [12] with O.A.C. Chapter 4901:1-37, it is perfectly appropriate to direct FirstEnergy to prove compliance. No intervenor bears a burden of proving non-compliance.

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[9] O.A.C. 4901:1-37-02(E).

[10] Case No. 20-1502-EL-UNC (Sept. 15, 2020 Entry). As stated in this Entry, "[T]he Companies are directed to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of Am. Sub. H.B.6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state." *Id*. at ¶ 5.

[11] Entry (Oct. 12, 2021) ¶ 24.

[12] O.A.C. 4901:1-37-02(E).

A show cause proceeding would also be consistent with the enforcement process spelled-out in O.A.C. Chapter 4901:1-23, which governs enforcement actions against CRES suppliers, as well as enforcement against electric EDUs in matters concerning the electric service and safety standards, O.A.C. 4901:1-10. Under Chapter 4901:1-23, "The commission may initiate a compliance or other proceeding upon its own initiative, or after an incident has occurred, after a complaint is filed pursuant to section 4905.26 of the Revised Code, or after a staff notice of probable noncompliance is served."[13] Thereafter, "the staff shall file . . . a written report of investigation (investigative report)" within 45 days.[14] The report must address "the findings of any alleged noncompliance" and "Staff's recommendations for commission action."[15] Finally, "The commission shall hold an evidentiary hearing on all proceedings initiated under this rule. The hearing may include evidence on the issues of proposed corrective action, compliance orders issued by the commission, forfeitures, enforcement of a commission order, and other remedies."[16]

This proceeding already resembles an enforcement action under Chapter 4901:1-23. The audit reports are the functional equivalent of Staff Reports: like Staff Reports, the audit reports contain "the findings on any alleged non-compliance" and "recommendations for commission action."[17] The audit reports provide clear notice of the rules at issue, information the auditors' reviewed, and the basis for their findings and recommendations—in other words, everything a

[13] O.A.C. 4901:1-23-05(A).

[14] *Id*. at (C).

[15] *Id*. at (C)(1) and (2).

[16] *Id*. at (D)

[17] *Id.* at (C).

Staff Report would contain in a Chapter 4901:1-23 enforcement proceeding. The requested show cause order would not be a new or novel process.

R.C. 4905.26 requires that notice to a respondent of alleged violations be given to a respondent within 15 days of a scheduled hearing. There is ample time to notify FirstEnergy and other parties that the February 2022 hearing will be a show-cause hearing.

D. FirstEnergy should be directed to file an amended corporate separation plan.

This proceeding coincided with a certification proceeding involving a new FirstEnergy affiliate, Suvon LLC. Despite red flags raised in the Sage Report (which were again called to the Commission's attention in the certificate proceeding), the Commission certified Suvon to market and sell nonelectric products and services. That decision was recently reversed on appeal.[18] An order on remand in the Suvon certificate case advises that the Commission "cannot permit Suvon to continue advising its current customers" but that the order does not "preclude customers from continuing to be served under existing contracts[.]"[19] As things stand currently, Suvon does not have a license *and withdrew its request* to obtain one, yet is still serving 165,000 customers (thus begging the question of what possible motive Suvon has to ever re-apply for a certificate).

Certified or not, FirstEnergy affiliates cannot lawfully offer nonelectric products and services unless the companies operate under an approved corporate separation plan.[20] Virtually all the corporate separation issues identified by the auditors stem from a corporate separation plan that: (a) has been inadequate and insufficient since day 1, and (b) has never been followed

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[18] *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Electric Serv. Power Broker and Aggregator*, 2021-Ohio-3630.

[19] Case No. 20-103-EL-AGG (Nov. 3, 2021 Order on Remand) ¶ 11.

[20] R.C. 4928.17(A).

in any event. It was bad enough that Suvon was certified in the first place. It would be outrageous to allow the now-uncertified Suvon to maintain its current customers while continuing to ignore FirstEnergy's pitifully deficient corporate separation plan.

The FirstEnergy EDUs filed their corporate separation plan in Case No. 09-462-EL-UNC and received approval under a stipulation filed in Case No. 10-388-EL-SSO.[21] As indicated in previous comments, the plan does not disclose or permit use of the "FirstEnergy" name by affiliates. Nor does the plan sufficiently address functional separation between the activities of the EDUs and affiliates. (As both auditors observe, allowing the Service Company to jointly manage both regulated and unregulated businesses is a serious problem.)[22] The plan lists affiliates, but the list is badly outdated. For example, FES remains on the list but is no longer an affiliated entity; Suvon is not on the list but is an active affiliate actively serving customers (without a certificate, no less).

After FirstEnergy's plan was approved, it was apparently stuffed in a drawer and forgotten about.[23] According to Daymark, "corporation separation was something [employees] were aware of" but there was "little formal monitoring or documentation" for compliance purposes.[24] "[FirstEnergy's] assumption is that compliance is happening until it is not happening

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[21] Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) at 16.

[22] Daymark Report at 9-12; Sage Report at 34-37.

[23] The Commission approved the corporate separation plan right around the time the EDUs paid $43 million more than market prices for renewable energy credits purchased from FES. Even then, the Commission brushed aside OCC's request to investigate possible corporate separation violations, finding "no evidence in the record in this proceeding to support further investigation at this time." *In re Ohio Edison Co*., 2018-Ohio-229.

[24] Daymark Report at 5.

and thus becomes an issue."[25] Even if FirstEnergy "complied" with the plan, the plan itself is inadequate. "FirstEnergy leans heavily on compliance with FERC requirements to meet the Ohio corporate separation requirements," but outside of O.A.C. 4901:1-37-4, "almost no overlap existing between the Ohio specific and FERC rules."[26] Daymark reports that "FirstEnergy has internally discussed this gap" but "has not taken any action to address this gap."[27] FirstEnergy knows its plan is outdated but has no intention of modifying it until told to do so.[28]

The Commission should direct FirstEnergy to file an amended corporate separation plan that accurately reflects *current* circumstances and clearly addresses each factor enumerated in 4901:1-37-04 and -05.[29] This directive need not be any more specific than that. FirstEnergy is responsible for corporate separation compliance, not the Commission or any intervenor. The current plan is simply too vague, insufficient, and incomplete to allow even certified affiliates to offer competitive goods and services, let alone affiliates who are not certified.

No statute requires the Commission to conduct a hearing before ordering the filing of a revised corporate separation plan. The revised plan can be litigated at the February 10, 2022 hearing and become effective when the Commission issues a final order. FirstEnergy has been on notice of deficiencies in its corporate separation plan literally for years, so it should not be heard to complain that requiring it to develop and defend a new plan imposes any undue burden.

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[25] *Id*. at 6.

[26] *Id.* at 5-6.

[27] *Id.* at 6.

[28] *Id*.

[29] "[T]he commission, pursuant to a request from any party *or on its own initiative*, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances." O.A.C. 4901:1-37-06(A).

III. CONCLUSION

In its final order in the Retail Market Investigation COI opened nearly a decade ago, the Commission recognized that "it is imperative that utility and affiliate activities undergo vigilant monitoring in order to ensure their compliance with R.C. 4928.17 and Ohio Adm.Code 4901:1-37 [.]"[30] The order directed EDUs to undergo a corporate separation audit every four years.[31] The Commission found it important to "emphasize that EDUs are required [] to file any subsequent changes" to an approved corporate separate plan "no later than sixty days prior to the change taking effect."[32] Unfortunately, these words have not been backed with action. This docket represents the first and only corporate separation audit of any Ohio EDU. A report issued almost four years ago describing serious corporate separation violations yet rather than curtail FirstEnergy's affiliate activities, the Commission authorized FirstEnergy to expand them.

Now that the Commission appears ready to act, it is important to proceed lawfully. The requested show cause order would satisfy all outstanding notice issues, clarify the scope of the issues at hearing, and properly assign the burden of proof. The Commission should issue the order without delay.

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[30] Case No. 12-3151-EL-COI (March 26, 2014 Opinion and Order) ¶ 16.

[31] *Id.*

[32] *Id*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on November 22, 2021:

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Summary: Comments Initial Comments of Direct Energy Business, LLC and Direct Energy Services, LLC Regarding Daymark Energy Advisors' Compliance Audit electronically filed by Ms. Valerie A Cahill on behalf of Direct Energy Business, LLC and Direct Energy Services, LLC