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

REPLY 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)[1] submit these Reply Comments in response to initial comments filed on November 22, 2021.

I. INTRODUCTION

Predictably, the parties' initial comments to the Daymark Report confirm what was already known from the Sage Report.[2] FirstEnergy[3] has done nothing since the last audit to update its deficient corporate separation plan. A robust monitoring and compliance function remains non-existent. Common management within FirstEnergy Service Company (FE Service) continue to pull the strings for both regulated and unregulated affiliates. The "FirstEnergy" name and logo remain the centerpiece of joint marketing among the FirstEnergy EDUs[4] and

[1] NRG Energy Inc. acquired the North American assets of Centrica on January 4, 2021, including Direct Energy Business, LLC and Direct Energy Services, LLC.

[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).

[3] "FirstEnergy" refers to FirstEnergy Corp. (the parent holding company) and its subsidiaries collectively. These comments use "FirstEnergy" in a general, collective sense to avoid unnecessary confusion in contexts where the identify of specific subsidiaries or legal entities is immaterial.

[4] "FirstEnergy EDUs" refers to the Ohio electric distribution utility subsidiaries, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

unregulated affiliates. And the FirstEnergy EDUs *still* cannot provide details about fees paid to FE Service; the EDUs apparently aren't allowed to see their own books.

The initial comments reinforce the need to issue a show cause order as soon as possible. Corporate separation has only gotten worse at FirstEnergy since this investigation began, and it is beyond time to do something about it.

II. REPLY COMMENTS

FirstEnergy's participation in the competitive market for "nonelectric" products and services has been and continues to be Direct's chief concern.[5] Direct was a member of the Retail Energy Supply Association (RESA) when RESA filed its complaint over FirstEnergy's "Smart Mart" program shortly before Sage issued its report in this proceeding.[6] RESA later filed comments to the Sage Report and, more recently, opposed Suvon LLC's application for certification to provide competitive retail electric service.[7] Given the previous attention devoted to corporate separation violations, Direct's initial comments focused on the proper procedure for addressing these violations rather than the violations themselves.

These reply comments generally follow suit to reinforce three points. First, FirstEnergy's initial comments reflect a culture and attitude about corporate separation that has only gotten worse since Sage issued its report over three-and-a-half years ago. Second, a show cause proceeding is the best path forward to address not only Direct's concerns, but the concerns raised by others. Third, the Commission should *not* stay this case to further investigate H.B. 6 or

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[5] "Competitive retail electric service" encompasses two distinct categories: (i) electric supply and (ii) "product or service other than retail electric service." R.C. 4928.17(A). "Nonelectric" products and services refers to the latter category.

[6] *See* Case No. 18-0736-EL-CSS, Complaint (Sept. 25, 2018).

[7] *See* Case No. 20-0103-EL-AGG, RESA Motion to Intervene and Memorandum in Support (March 17, 2020).

collusion between FirstEnergy and the former Commission Chair. A show cause proceeding should allow parties who wish to raise these issues to raise them.

Accordingly, the Commission should grant the show cause order described in Direct's initial comments.

A. FirstEnergy's comments exacerbate concerns about the unlawful provision of competitive, nonelectric products and services.

The RESA Complaint, the Sage Report, and the Daymark Report establish that FirstEnergy's provision of nonelectric products and services—whether through the FirstEnergy EDUs, Suvon, FE Service, or some combination—is utterly unlawful. FirstEnergy's comments do not alleviate these concerns in the slightest.

FirstEnergy says that Daymark's review "encompassed an examination of and recommendations for the products and services offered *by the Companies* with support from FirstEnergy Products ("FEP"), a business unit within FirstEnergy Service Company. *These products are offered by the Companies* consistent with the Commission's approvals of their Corporate Separation Plan, as well as the Companies' Commission-approved tariffs."[8] These comments raise three major red flags.

First, the *Companies* are not allowed to offer competitive products or services. FirstEnergy must "implement and operate under" a corporate separation plan that provides "at a minimum, for the provision of the competitive retail electric service or the nonelectric product or service *through a fully separated affiliate of the utility*[.]"[9] FirstEnergy has admitted that it is not following this statutory mandate.

[8] FirstEnergy at 1-2.

[9] R.C. 4928.17(A)(1).

Second, FirstEnergy's comments add to the mystery of which FirstEnergy entity is actually providing competitive products and services. Their comments identify "the Companies" but FirstEnergy has also identified Suvon as the provider. Whoever the provider is, the provider receives "support" from FEP which, from a legal entity standpoint, means FE Service. FirstEnergy's unclear and inconsistent narrative belies any claim that these entities are "fully separated" or "function independently."

Third, as originally explained in the RESA Complaint and again in comments to the Sage Report, neither the corporate separation plan nor any tariff allows the FirstEnergy EDUs to provide nonelectric products or services—if they did, the plan and the tariffs would be contrary to statute and void. The corporate separation plan characterizes the Special Customer Services tariff to allow "other utility-related services, programs, maintenance and repairs related to customer-owned property, equipment and facilities,"[10] but the actual tariffs come nowhere close to describing products and services such as home warranties, surge protection, outdoor lighting, or myriad other competitive products and services offered by FirstEnergy. If they did, there would be no need for Suvon.

FirstEnergy did not need anyone's permission to withdraw the Suvon application; a simple notice filing would have sufficed. FirstEnergy styled the withdrawal as a "motion" to tee-up what it really wanted: the Commission's blessing to continue serving customers under contracts entered before the Supreme Court invalidated its certificate.[11] The Commission granted

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[10] *See* Ohio Edison Company, P.U.C.O. No. 11, Original Sheet 4, Page 13 of 21, Section X.C., effective January 23, 2009; The Cleveland Electric Illuminating Company, P.U.C.O No. 13, Original Sheet 4, Page 13 of 21, Section X.C., effective May 1, 2009; and The Toledo Edison Company, P.U.C.O No. 8, Original Sheet 4, Page 13 of 21, Section X.C., effective January 23, 2009.

[11] Case No. 20-0103-EL-AGG, Motion to Withdraw (November 2, 2021).

FirstEnergy's motion within 24 hours, and this has created an untenable situation that cannot be allowed to persist indefinitely.

FirstEnergy is not required to offer nonelectric products and services; it entered this market voluntarily and remains in this market voluntarily. Competitive products and services are nonessential; customers do not need these products or services to receive essential utility services, and those who want the competitive products or services may obtain them from any number of suppliers. It is standard, common practice for suppliers to include "regulatory out" provisions in their contacts to address situations where a regulatory decision or change of law renders contract performance unlawful. Even if Suvon's contracts do not have this provision (which is highly doubtful), the company knew before entering these contracts that its certificate remained under challenge. Any potential liability Suvon would incur for terminating these contracts is Suvon's problem—not the Commission's, not customers', and not competitors'. FirstEnergy *could* exit the competitive products and services market but has made a calculated decision not to.

It does not seem to have occurred to FirstEnergy that exiting the products and services market would narrow the issues in this proceeding considerably. (Or perhaps it has, but FirstEnergy concluded the money to be made is worth litigating.) A corporate separation plan is only required if an affiliate of an electric utility sells competitive services.[12] Therefore, withdrawing from the nonelectric products and services market would eliminate FirstEnergy's need to file a revised a corporate separation plan. Whether FirstEnergy violated its existing plan prior to its withdrawal from the competitive market would remain an issue, but there would be

[12] *See* R.C. 4928.17(A) (engaging in business of supplying product or service other than retail electric service prohibited "*unless* the utility implements and operates under a corporate separation plan[.]" (Emphasis added.)

no need to litigate a revised plan. If FirstEnergy decided to re-enter the market in the future, it could file a revised corporate separation plan at that time. The Commission and parties could then consider whether the revised plan could or should allow joint marketing under the "FirstEnergy" name and mark; whether a "sharing mechanism" is appropriate; and whether affiliates have been organized and managed to function independently. FirstEnergy's decision to remain in the nonelectric products and services market means the Commission must address not only past conduct, but future conduct.

As for the future, FirstEnergy promises to develop a corporate separation plan that will "proactively address gaps between Ohio corporate separation compliance requirements and FERC compliance requirements" and "build a robust and effective compliance plan focused solely on Ohio's specific corporate separation requirements[.]"[13] If recent history teaches anything, it teaches that FirstEnergy is quick to exploit any regulatory directive that relies on trust without verification. The Commission should order FirstEnergy to back its words with action. If FirstEnergy is truly ready and willing to turn the page, it should have no objection to promptly filing a revised corporate separation plan and defending that plan at a show cause hearing.

By withdrawing Suvon's application, FirstEnergy has acknowledged that it cannot meet the certification requirements. FirstEnergy's comments *expressly* acknowledge that its existing corporate separation plan is deficient. Allowing FirstEnergy to remain in the competitive market is bad enough; to allow it to remain in the market indefinitely, without a certificate and without confirmation that it has implemented the reforms it has promised to make, would be unconscionable.

[13] FirstEnergy at 2.

B. A show cause hearing is appropriate.

Most parties' comments request the Commission to issue an order finding violations and imposing various sanctions and remedies. Direct agrees with the sentiment expressed in these comments but continues to urge caution in how the Commission proceeds.

Vistra, IGS, NOPEC, OCC, and IEU-Ohio make persuasive cases that FirstEnergy has violated corporate separation rules by, among other things, promoting competitive and noncompetitive services through joint marketing emphasizing the "FirstEnergy" name and mark;[14] cross-subsidization through practices such as "soft transfers" and combined billing;[15] failing to implement or observe proper cost allocation procedures or other compliance measures;[16] and allowing the same FE Service personnel to manage competitive and noncompetitive businesses.[17] Many of the violations described appear so clear-cut that an evidentiary hearing seems superfluous. As a practical matter, this is probably true: FirstEnergy has not disputed any of the auditors' material findings. This does not necessarily mean FirstEnergy has waived its right to do so.

1. A hearing is required.

As Direct explained in its initial comments, the Commission has invoked its investigative authority under R.C. Chapter 4903 but has *not* invoked its enforcement authority under R.C. Chapter 4928. This presents a challenge to immediately sanctioning FirstEnergy based solely on parties' comments. A show cause order would solve this problem.

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[14] Vistra at 8; IGS at 30-34; NOPEC at 20-24; OCC at 24-28.

[15] Vistra at 2-3, 8; IGS at 16-22; NOPEC at 6-15; OCC at 19-24; IEU Ohio at 3-4.

[16] Vistra at 11; IGS at 22; NOPEC at 6-15; OCC at 19-24; IEU Ohio at 5.

[17] Vistra at 6-8; IGS at 22-24; OCC at 24-28.

R.C. 4928.18 and the Commission's rules state that corporate separation enforcement actions are to be conducted under the general complaint statute, R.C. 4905.26.[18] The complaint statute affords the right to a hearing. FirstEnergy could certainly waive this right, but that does not seem likely. Comments are a "casual approach" which "does not, by itself, satisfy the detailed requirements of R.C. 4905.26."[19]

Moreover, the right to a hearing includes the right to notice. The only "notice" given thus far is that a hearing will commence on February 10, 2022.[20] The complaint statute requires more. Under R.C. 4905.26, the Commission must not only "fix a time for hearing" but also "state the matters complained of." Various intervenors have "complained" in a colloquial sense by filing comments alleging violations, but none have filed the necessary "complaint in writing" to trigger the statutory hearing requirement. The *Commission* has not notified FirstEnergy whether it must answer to these allegations.

The Commission should exercise its "initiative" to enforce the corporate separation rules by issuing a show cause order.[21] A show cause order would not only satisfy the notice requirements of R.C. 4905.26 but also ensure an orderly, expeditious proceeding by identifying the issues and properly assigning the burden of proof. None of the initial comments oppose a show cause proceeding, and several affirmatively support such a proceeding.[22]

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[18] R.C. 4928.18; O.A.C. 4901:1-37-02(E).

[19] *Ohio Bell Tel. Co. v. Pub. Util. Comm.,* 64 Ohio St. 3d 145, 145, 593 N.E.2d 286, 288 (1992).

[20] Entry (Oct. 12, 2021) ¶ 24.

[21] R.C. 4905.26.

[22] NOPEC at 6; Vistra at 11; IGS at 38-39; OMA Energy Group at 21.

2. The scope of a show cause hearing should not be limited to the audit reports.

The scope of a show cause proceeding should not be artificially limited by the audit reports. FirstEnergy is responsible for compliance with all corporate separation rules at all times. A hearing on a show cause order should allow all parties to "speak now or forever hold your peace" on corporate separation issues, whether addressed by the auditors or not.

The auditors performed an investigative function no different than a function Commission Staff commonly performs. Staff investigative reports inform Commission decisions but they do not represent the Commission's decision, nor do they define the proper scope of a proceeding. In any case centered around a Staff Report, parties are free to argue that Staff improperly included or excluded certain issues or addressed the correct issues but reached the wrong conclusion. There is no reason to treat this investigation differently.

Limiting the scope of the proceeding to the audit reports would not only invite non-stop debate over whether certain issues were or were not encompassed in the audits; carving-out certain issues would mean that those issues are fair game for a future proceeding. In the interest of finality, any issue pertaining to corporate separation that could be raised should be raised for resolution at the show cause hearing.

The Commission should not artificially limit the scope of this proceeding.

C. The Commission should not stay or delay this proceeding to conduct supplemental audits or investigations.

Some parties have criticized the Commission or auditors for not pursuing more leads in the investigation. NOPEC, for example, believes the Daymark Report is "incomplete" because the auditors "failed to investigate any FE EDU activities involving tainted HB 6" and "failed to investigate the collusion among FirstEnergy Advisors, the FE EDUs and former Chair

Randazzo" to secure a CRES certificate for Suvon.[23] OCC agrees, and also wants to suspend this proceeding for another investigation. Direct sympathizes with NOPEC and OCC to a certain extent but giving them what they have asked for would be counterproductive.

Suppose the Commission stays this proceeding to launch another investigation. Even the most ambitious schedule would not likely produce a report until early to mid- 2023. A comment period would push the proceeding into 2024. And then what? The parties and Commission would be right back where we are today, debating how to transition from investigating to enforcement. In the meantime, FirstEnergy will presumably remain in the competitive products and services market, the RESA complaint will remain in limbo, and the public will wonder why no action has been taken on matters they have been reading about in the newspaper every other day.

It is wrong to assume that the Commission cannot find violations based on conduct that the Commission has not hired outside auditors to investigate. There is no procedural, evidentiary, or other logical reason to prohibit NOPEC or OCC from introducing evidence themselves concerning the issues they have asked the Commission to investigate. The Commission *could* independently investigate these matters, but the decision of whether to do so should not affect any litigant's right to raise these matters independently. "Any person" may complain that "an electric utility or its affiliate has violated any provision of section 4928.17[.]"[24] The Commission does not need to investigate matters that parties may investigate themselves and present evidence at hearing.

The *last* thing the Commission should do is suspend this proceeding for another investigation.

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[23] NOPEC at 2-3.

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

III. CONCLUSION

The Commission should end its investigation, issue the requested show cause order, and provide a forum to hold FirstEnergy accountable for violating corporate separation rules.

Dated: December 13, 2021

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 December 13, 2021:

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Summary: Comments Reply 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