

**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)	Case No. 17-974-EL-UNC
Compliance with R.C. 4928.17 and Ohio)	
Admin. Code Chapter 4902:1-37.)	

**NORTHEAST OHIO PUBLIC ENERGY COUNCIL's
REPLY COMMENTS TO THE DAYMARK ENERGY ADVISORS' AUDIT REPORT**

I. INTRODUCTION

The FirstEnergy electric distribution utilities' ("FE EDUs")¹ comments to the Daymark Energy Advisors' Audit Report ("Daymark Report") are as undeveloped as their woefully inadequate corporate separation plan. Their comments offer broad generalizations as to aspects of the report that they will accept, but offer no specifics as to how their plan will be amended, implemented and governed. Their comments are not serious and don't warrant a serious reply.

On the other hand, the intervening parties to this proceeding have offered constructive comments as to (1) the need for a supplemental audit to investigate how the FE EDUs' HB 6 scandal-related activities violated the corporate separation rules, (2) the existing (and massive) extent of the FE EDUs' violations of corporate separation rules, (3) the penalties that should be assessed to hold the FE EDUs accountable for past violations, and to prevent future violations, including civil forfeiture and barring FE EDU affiliate/subsidiary operations in Ohio for five years, (4) amendments that should be made to FE EDUs' corporate separation plan, and (5) and the process by which each of these issues should be resolved.

¹ The FE EDUs are Ohio Edison Company, The Toledo Edison Company and The Cleveland Electric Illuminating Company.

On the basis of the existing comments filed in this proceedings, NOPEC recommends that the PUCO should:

1. order a supplemental audit to make a complete record in this proceeding of the FE EDUs' alleged corporate separation violations as they relate to the FE EDUs' involvement in the HB 6 scandals;
2. order the FE EDUs to file an amended corporate separation plan that is compliant with R.C. 4928.17 and O.A.C. Chapter 4901:1-37, and incorporates the auditors' and parties' recommendations with which the FE EDUs agree;
3. hold a hearing, in which the FE EDUs have the burden of proof (O.A.C. 4901:1-37-02(E)):
 - (a) as to whether the FE EDUs have violated the corporate separation rules as identified in the supplemental audit and by the existing Daymark Report, the SAGE Management Audit Report ("SAGE Report") and the intervening parties' comments, and
 - (b) as to whether the amended corporate separation plan is compliant with R.C. 4928.17 and O.A.C. Chapter 4901:1-37;
4. issue an order making findings of fact on the alleged corporate separation rules violations, assessing appropriate remedies which include applicable civil forfeitures, a five-year stay-out for FE EDU affiliates and subsidiaries, and revisions to the amended corporate separation plan; and
5. order the FE EDUs to file the revised corporate separation plan consistent with its findings within three months of the order's issuance, which revised plan shall be subject to the PUCO's and intervening parties' review and comment.

II. REPLY COMMENTS

A. A supplemental audit is required to investigate the collusion among FirstEnergy Advisors, the FE EDUs and former Chair Randazzo to secure affiliate FirstEnergy Advisors' certification and to investigate the HB 6 scandal's effect of corporate separation.

As the PUCO is aware, NOPEC and the Office of the Ohio Consumers' Counsel ("OCC") filed a joint motion for a supplemental audit on November 5, 2021. The joint motion requested that the supplemental audit be conducted to investigate two matters. The first was the disturbing, unlawful *ex parte* communication between Chuck Jones, CEO of the FirstEnergy Utilities, and former PUCO Chair Randazzo in early March 2020. The communication was made at the behest of Dennis Chack, President of FirstEnergy Advisors, regarding approval of FirstEnergy Advisors' pending certification application in Case No. 20-103-EL-AGG. Because the full communications were not revealed until November 2, 2021, the auditor has not been given the opportunity to investigate them and whether the activities of personnel for the FE EDUs and their competitive affiliate, FirstEnergy Advisors, violated the PUCO's corporate separation laws. Joint Motion at 2. To be clear, the communications were made against the backdrop of over \$4.3 million in direct or indirect payments to former Chair Randazzo to advance the FE EDUs' regulatory interests.² Clearly, the affiliates were not functioning independently of each other as required by R.C. 4928.17(A)(1) and O.A.C. 4901:1-37-04(A)(1). Moreover, the payments were allocated to the FE EDUs³ and at least a portion recovered from their customers, in an extreme abuse of market power, in violation of R.C. 4928.17 and O.A.C.

² See <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001031296/000103129620000045/fe20200930.htm> (Schedule I, Noncompliance Event).

³ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Supplemental Response to the September 15, 2020 Show Cause Entry at 1 (Aug. 6, 2021).

4901:1-37-02, and 4901:1-37-04(D)(8). Further investigation is required into the full extent of this abuse.

Second, even though the PUCO opened the Daymark Audit phase of this proceeding to investigate FirstEnergy's HB6-related activities,⁴ a PUCO Staff member informed respondents to the related RFP that H.B. 6 matters should not be investigated. See Joint Motion, Attachment A. The auditor's report acknowledges that (per the PUCO Staff's instructions) they did not evaluate any information covered by the PUCO's other HB6-related investigations. Joint Motion, Memorandum in Support at 8.

By entry of November 12, 2021, the Attorney Examiner briefly extended the comment period in this proceeding to provide the parties the opportunity to file memoranda contra the Joint Motion. No party responded and the motion is unopposed.

In its November 22, 2021, comments to the Daymark Report, the Ohio Manufacturers' Association Energy Group ("OMAEG") also calls upon the PUCO to order a supplement audit to investigate these same issues, as well as other deficiencies in the audit report, including: (1) the failure to evaluate records of FirstEnergy Corp.'s Chief Ethics Officer, and (2) the failure to examine whether there are sufficient safeguards in place associated with the FirstEnergy Regulated Utility Money Pool to ensure compliance with Ohio's corporate separation requirements. OMAEG Comments at 6-14. NOPEC supports OMAEG's comments and renews the unopposed request that the PUCO order a supplemental audit into the matters identified in the Joint Motion and OMAEG's comments.

⁴ See Entry, November 4, 2020, ¶ 17.

B. After the supplemental audit is completed, the PUCO should hold an evidentiary hearing on (1) the FE EDUs' alleged violations of the PUCO's corporate separation rules (and assess remedies, including forfeitures and stay-outs, where warranted) and (2) the amended FirstEnergy corporate separation plan.

The ultimate goal of this proceeding is that the FE EDUs finally file and adhere to a corporate separation plan that is compliant with R.C. 4928.17 and O.A.C. Chapter 4901:1-37. The other purpose of this proceeding is to identify the FE EDUs' violations of O.A.C. Chapter 4901:1-37 and assess appropriate remedies. See Entry, May 17, 2017; Entry, November 4, 2020. NOPEC agrees with Direct Energy Services/Direct Energy Business ("Direct Energy") that these two purposes can be considered concurrently in a single evidentiary hearing.

The FE EDUs have agreed to implement some recommendations of the Daymark Report, but have been unnecessarily vague about specific amendments it would make to its corporate separation plan. The PUCO should order the FE EDUs to file an amended corporate separation plan for consideration in this proceeding. The filing likely will aid administrative efficiency by potentially eliminating some issues that otherwise would be litigated.

The hearing also will serve to litigate, and provide remedies (including forfeitures and stay-outs), for the FE EDU's violations of R.C. 4928.17 and O.A.C. Chapter 4901:1-37. These alleged violations have been identified in the Daymark Report and the SAGE report, as well as in the comments of intervening parties to this proceeding.

NOPEC's position has been clear throughout this proceeding and in FirstEnergy Advisors certification case (Case No. 20-103-El-AGG). The FE EDUs should be structurally separate from their competitive affiliates and should not share the same brand name and logo. Specifically, NOPEC has argued that the FE EDUs violated the corporate separation rules by sharing the same management and brand name/logo with FirstEnergy Advisors. NOPEC's position has nearly unanimous support from the intervening parties in their supplemental comments addressing the

FirstEnergy Advisor certification case⁵ (filed May 29, 2020) (“Supplemental Comments”)⁶ and in their initial comments to the Daymark Report (filed November 22, 2021) (“Daymark Comments”):

1. The Office of the Ohio Consumers’ Counsel (“OCC”) opposed FirstEnergy Advisors’ use of the “FirstEnergy” name and asks the Commission to follow the lead of the Illinois Commerce Commission, which prohibits utilities and their competitive affiliates from sharing names and logos.⁷ OCC also agrees that the corporate separation rules preclude senior management of the EDUs from sharing a dual capacity with FirstEnergy Advisors.⁸ See, also, OCC Daymark Comments at 24-28.
2. The Retail Energy Supply Association (“RESA”) opposed FirstEnergy Advisors’ use of the “FirstEnergy” name because it provides First Energy Advisors an undue preference or advantage over other CRES providers in violation of R.C. 4928.17(A)(3).⁹ RESA agrees that if FirstEnergy Advisors’ executive management team and employees also perform services for the FE EDUs, the two entities are not “fully separate utilities” as required by R.C. 4928.17(A).¹⁰ Moreover, RESA agrees with NOPEC that housing all FirstEnergy Advisors’ employees with the FE EDUs at 76 South Main Street, Akron, Ohio is highly inappropriate, especially when the

⁵ See Entry, April 29, 2020.

⁶ Although FirstEnergy Advisors withdrew its application to provide competitive retail electric service, its motion to withdraw indicates that it will refile the application in the near future. Comments pertaining to FirstEnergy Advisors remain relevant for this reason and for the purpose of finding violations of the corporate separation rules and assessing forfeitures and barring the FE EDUs’ affiliates or subsidiaries from operating in Ohio for a period of five years.

⁷ OCC Supplemental Comments at 4.

⁸ *Id.* 8.

⁹ RESA Supplemental Comments at 5.

¹⁰ *Id.* at 6.

EDUs' approved corporate separation plan requires that regulated and non-regulated employees be physically separated where practical.¹¹

3. Vistra Energy Corp. ("Vistra") also explains why FirstEnergy Advisors' use of the "FirstEnergy" name and logo violates Ohio's EDU corporate separation laws. It cites Texas decisions and Illinois rules that prohibit the practice.¹² Vistra also agrees that FirstEnergy Advisors' three executive managers should not have been shared with the FE EDUs, citing the requirement in O.A.C. 4901:1-37-04(D)(3) that the FE EDUs must contemporaneously share information with all CRES providers. By having joint management, FirstEnergy Advisors necessarily would receive information from the FE EDUs before any other CRES provider.¹³ See, also, Vistra Daymark Comments at 2, 7-9.
4. Interstate Gas Supply ("IGS") agrees that FirstEnergy Advisors should be prohibited from using the "FirstEnergy" name because it gives an undue preference to FirstEnergy Advisors in violation of R.C. 4928.17(A)(3). IGS also cites to the Texas decision preventing shared use of names and logos by a utility and its competitive affiliates.¹⁴ See, also, IGS Daymark Comments at 21-22, 30-34.
5. IEU Ohio agrees that the FE EDUs and FirstEnergy Service Company should be structurally separated from FirstEnergy Products, FirstEnergy Advisors, FirstEnergy Home, and any other affiliated company that exists now or in the future and which offers nonelectric products and services or a competitive retail electric service, in

¹¹ *Id.* at 7.

¹² Vistra Supplemental Comments at 14.

¹³ *Id.* at 15.

¹⁴ IGS Supplemental Comments at 9-12.

accordance with R.C. 4928.02 and 4928.17(A). IEU-Ohio Daymark Comments at 3-4.

Although NOPEC's participation in this proceeding has been focused on the sharing of management and name/logos between the regulated FE EDUs and their competitive affiliates, it also supports the other intervening parties' allegation of rules violations including:

1. The FE EDUs' recordkeeping was insufficient in violation of R.C. 4928.17(A)(3) and O.A.C. 4901:1-37-07(A). OCC Daymark Comments at 6; OMAEG Daymark Comments at 7-14; IEU Ohio Daymark Comments at 5.
2. The FE EDUs violated R.C. 4928.17(A)(3), because their corporate separation plan did not cover Ohio-specific corporate separation requirements. OCC Daymark Comments at 14; NOPEC Daymark Comments at 23; IEU-Ohio Daymark Comments at 4, Direct Energy Daymark Comments at 10; and Vistra Daymark Comments at 2, 10.
3. The FE EDUs violated R.C. 4928.17(A)(3), because their corporate separation plan did not provide for proper training of employees. OCC Daymark Comments at 15.
4. The FE EDUs violated R.C. 4928.17(A)(3), because their corporate separation plan did not provide for the needed oversight and monitoring. OCC Daymark Comments at 17; IEU Ohio Daymark Comments at 5.
5. The FE EDUs used improper cost allocation methods that cross-subsidized their affiliates in violation of R.C. 4928.17(A)(1), (2) and (3); O.A.C. 4901:1-37-04(A)(1); O.A.C. 4901:1-37-04(B); and O.A.C. 4901:1-37-04(D)(6). OCC Daymark Comments at 19; IEU Daymark Comments at 5; IGS Daymark Comments at 17, 21-28.

6. The FE EDUs violated Ohio law and rules on cross-subsidization and cost allocation by their allocation of at least some of the costs for: (1) the \$60 million in payments to Generation Now as part of the H.B. 6 scandal; (2) a \$4.3 million payment in 2019 to an entity associated with the former PUCO Chair; and (3) ten years of other misallocated costs that supported an FE EDU affiliate. See OCC Daymark Comments at 23; IGS Daymark Comments at 10, 34-38. OMAEG at OMA 16-18

III. CONCLUSION

NOPEC respectfully submits that the weight of the comments offered in this proceeding support that a hearing be held in this proceeding to make findings on the corporate separation violations alleged in the Daymark Report, the SAGE Management Report and by the intervening parties' comments. Upon making its findings, the Commission should provide appropriate remedies, including assessing civil forfeitures for the violations, barring any FE EDU affiliate or subsidiary from providing CRES in this state for a period of at least five years, and requiring the FE EDUs to submit a revised corporate separation plan compliant with the PUCO's order, R.C. 4928.17 and O.A.C. Chapter 4901:1-37.

Respectfully submitted,



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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 Reply Comments was sent by, or on behalf of, the undersigned counsel to the following parties of record this 13th day of December 2021.



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behalf of Dane Stinson