

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Ohio)	
Edison Company, The Cleveland Electric)	Case No. 17-974-EL-UNC
Illuminating Company, and The Toledo)	
Edison Company's Compliance with R.C.)	
4928.17 and the Ohio Adm. Code Chapter)	
4901:1-37.)	

**INITIAL COMMENTS ON PROTECTING CONSUMERS FROM IMPROPER
CHARGES UNDER FIRSTENERGY'S "CORPORATE SEPARATION"
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

Corporate separation protects consumers from being charged by their monopoly utility (through cross-subsidization) for “extend[ing] any undue preference or advantage to any affiliate, division, or part of its own business...,” per R.C. 4928.17(A)(3). Proper corporate separation requires a strong commitment by management. But the commitment to good governance by FirstEnergy’s senior management has been lax. Indeed, most of them were terminated as a result of the recent scandals, including the compliance officer for corporate separation.

Indeed, Standard and Poor’s, the well-known credit ratings agency, gave this dour assessment of FirstEnergy’s management:

We believe these violations at the highest level of the company are demonstrative of insufficient internal controls and a cultural weakness. We view the severity of these violations as significantly outside of industry norms and in our view, they represent a material deficiency in the company’s governance.¹

¹ See Khalid, U., *S&P downgrades FirstEnergy following \$1.95B draw on revolving credit facility*, S&P Market Intelligence (Nov. 25, 2020).

On the regulatory side of the equation, the Staff of the Public Utilities Commission of Ohio (“PUCO”) inexplicably excluded FirstEnergy’s H.B. 6 misdeeds from the corporate separation audit’s scope. That action is a (not very good) reason for why the audit report by Daymark Energy Advisors (“Daymark”) begins with these otherwise startling words:

While information or documents produced in response to other audits or investigations may be relevant to evaluating whether FirstEnergy’s conduct in a particular situation was a violation of the laws and rules governing corporate separation, *they were not evaluated as part of this audit.* (Emphasis added.)²

Unfortunately for Ohio consumers, in a November 13, 2020 email the PUCO Staff answered “no” to a question from a potential bidder for the audit contract. The question was “does it include an audit of whether the source of funds for political and charitable spending by the Companies in support of Am. Sub. H.B. 6 was from rates or charges paid by Ohio ratepayers?” A good answer for state regulation of FirstEnergy should have been “yes.” (See Attachment – PUCO emails obtained through a public records request.)

It is difficult in this case for the PUCO to discover the facts about the FirstEnergy scandal while not looking for them. A supplemental audit is needed. A lack of strong government regulation coupled with what Standard & Poor’s described as a “material deficiency” in management is a bad mix for protecting utility consumers.

Ironically the PUCO Entry, in ordering this audit, stated that the purpose of the audit was to investigate “allegations against FirstEnergy Corp. regarding its conduct in the passage of Am.

² *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 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio at 1 (Sept. 13, 2021) (hereinafter referred to as “Daymark Audit Report”).

Sub. H.B. 6 and the subsequent referendum.”³ It is inexplicable that the PUCO’s auditor was not allowed to perform an independent audit that included H.B. 6 issues.

Thus, the audit does not even cover what should have been the centerpiece for consumer protection – investigating corporate separation in the context of FirstEnergy’s activities with H.B. 6, payments to the former PUCO Chair and related matters. To remedy this consumer protection gap, the Office of the Ohio Consumers’ Counsel (“OCC”) and the Northeast Ohio Public Energy Council (“NOPEC”) jointly asked the PUCO (in motions filed on November 5, 2021) to lift this audit constraint and conduct a supplemental audit.⁴

Further, the auditor’s litany of FirstEnergy’s lack of documentation and internal controls, plus the auditor’s lack of access to the former FirstEnergy compliance officer’s records, establish that FirstEnergy is *unauditable*. FirstEnergy should be penalized heavily for its convenient avoidance of PUCO auditing.

In spite of the PUCO Staff’s inexplicable narrowing of the scope of the audit (to exclude the FirstEnergy scandals), the auditor nevertheless found that FirstEnergy is compliant with only 23 of the 44 requirements of O.A.C. Chapter 4901:1-37.⁵ The auditor also found “some areas where we recommend clear improvements,” and specifically found “opportunities for improvement in 13 of the requirements and minor non-compliance with the remaining eight

³ *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 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶ 17 (Nov. 4, 2020).

⁴ *Id.*, Motion for Supplemental Audit, Motion to Extend Deadlines for Comments, Reply Comments and Hearing-Related Matters, Request for Expedited Ruling and memorandum in support by Office of the Ohio Consumers Counsel and Northeast Ohio Public Energy Council (Nov. 5, 2021).

⁵ Daymark Audit Report at 7.

requirements”⁶ In other words and despite FirstEnergy being conveniently unauditable, FirstEnergy has been shown to be in *noncompliance* with Ohio corporate separation laws and rules.

Even without the audit including H.B 6 issues, the known facts establish that FirstEnergy violated corporate separation law. FirstEnergy improperly charged the FirstEnergy Utilities for several items. One item was a portion of the \$60 million in payments to Generation Now to benefit a legislator for help in passing H.B. 6.⁷ Another item was a “FirstEnergy Corp. payment of \$4,333,333, made on January 2, 2019 under a consulting agreement with Sustainability Funding Alliance (“SFA”) [an entity associated with former PUCO Chair Randazzo], which the DPA indicates was political spending in support of House Bill 6.”⁸ And the third was for ten years of additional misallocated costs charged to the FirstEnergy Utilities.⁹

⁶ *Id.*

⁷ *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*, Deposition of Santino Fanelli at 129-130 (Mar. 9, 2021) (testifying that political and charitable spending costs involving Generation Now payments were allocated to the Ohio companies). .; see also *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1629-EL-RDR, Case No. 20-1629-EL-RDR, Compliance Audit of the 2020 Delivery Capital Recovery (DCR) Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, Expanded Audit Report at Table 24 at 27 (Auditor finding that a payment of \$355,800 to Generation Now was “unsupported” but nonetheless classified in part as capital investment and charged to FirstEnergy consumers through the 2017 Rider DCR and the Pole attachment charges). (Aug. 3, 2021).

⁸ *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).

⁹ *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1629-EL-RDR, Case No. 20-1629-EL-RDR, Compliance Audit of the 2020 Delivery Capital Recovery (DCR) Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, Expanded Scope at 9, Table 3.4 (indicating the total amount of vendor payments that were identified by the Companies as “improperly classified, misallocated to [the Companies], or lacked proper supporting documentation” was \$24.46 million, The auditor also found in the documents provided by FirstEnergy, there were “payments made to two entities (IEU Ohio Administration and Sustainability Funding Alliance) that have a relationship to Sam Randazzo,” Expanded Scope at 11 (Aug. 3, 2021). The Auditor also noted that FirstEnergy identified payments to 12 vendors related to Tony

Daymark summed up the insufficiency of the FirstEnergy Utilities' corporate separation plan: "Of the total 44 [areas of corporate separation] requirements, FirstEnergy is compliant with 23 of the requirements."¹⁰ A score of 23 out of a possible 44 equals 52%. In general letter grade terms, a failing grade is a score below 60%. Thus, FirstEnergy deserves an "F" from the PUCO for its failed corporate separation against the public interest. It is in violation of R.C. 4928.17(A)(3) and O.A.C. 4901:1-37-07.

For violations of corporate separation, the PUCO should impose major forfeitures on the FirstEnergy Utilities, commensurate with the seriousness of these offenses. In total, OCC preliminarily recommends a range of forfeitures from \$55,475,000 to \$110,950,000 related to the severe and continuous corporate separation violations.

OCC will likely recommend additional forfeitures upon obtaining further information as this investigation progresses (including what should be a supplemental audit). The PUCO should recognize that corporate separation failures may have enabled, in part, FirstEnergy scandals including the largest bribery scheme in Ohio history. The PUCO should also impose the additional remedial measures we recommend.¹¹

George as "inappropriate to charge to the Ohio operating companies" but gave no clear indication for the reasons. Expanded Scope at 12.

¹⁰ Daymark Audit Report at 7.

¹¹ OCC incorporates by reference all of its comments filed in this proceeding, including its Initial Comments (Dec. 21, 2018), Reply Comments (Jan. 7, 2019), Supplemental Comments (May 29, 2020) and Supplemental Reply Comments (June 15, 2020).

II. CONSUMER PROTECTION COMMENTS

A. For consumer protection under Ohio law, an electric utility must maintain a corporate separation plan “sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate” and the PUCO must enforce it. A utility must also “maintain records sufficient to demonstrate compliance” so the PUCO can enforce the corporate separation law.

1. The PUCO should find that the FirstEnergy Utilities’ recordkeeping was insufficient for consumer protection, in violation of R.C. 4928.17(A)(3) and O.A.C. 4901:1-37-07(A), such that their corporate separation was *unauditable*.

Ohio’s corporate separation law is found in R.C. 4928.17. That section requires utilities that are providing both competitive and non-competitive electric service to implement and operate under a corporate separation plan. The corporate separation must be sufficient to protect Ohioans from any undue preference or advantage to the utility’s affiliate:

Section 4928.17. Corporate separation plans.

(A) ...[N]o electric utility shall engage in this state...unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

* * *

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate....¹²

The PUCO also has rules for Ohio’s corporate separation law. The rules are found in O.A.C. 4901:1-37-07. O.A.C. 4901:1-37-07(A) sets out the responsibility of utilities to maintain books and records that are sufficient so that compliance with the PUCO’s rules may be demonstrated:

¹² R.C. 4928.17(A)(3).

O.A.C. 4910:1-37-07 Access to Books and Records

(A) The electric utility shall maintain records sufficient to demonstrate compliance with this chapter, and shall produce, upon the request of staff, all books, accounts, and/or other pertinent records kept by an electric utility or its affiliates as they may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code....¹³

The PUCO-appointed auditor, Daymark, found that much of the information and documentation required by law were simply missing from FirstEnergy’s corporate separation plan. That includes all records for the five-year period from 2016-2020¹⁴ when FirstEnergy was part of “the largest bribery, money laundering scheme in Ohio history.”¹⁵ Daymark fails to explain (but should have explained) why these records were missing. *How convenient for FirstEnergy to not be auditable.*

Although Daymark did not explicitly say so (but should have), FirstEnergy’s corporate separation plan was unauditable. Daymark’s findings on the plan’s deficiencies compels this conclusion. For example, Daymark reported it could not get access to the records of the compliance officer in place during the audit period of 2016 to 2020, since that person had been separated from the company prior to the start of the audit.¹⁶

Oddly, Daymark failed to adequately explain (but should have explained) why the termination of FirstEnergy’s compliance officer resulted in the lack of access to records that are the property of FirstEnergy, *not* the former employee. Daymark should be instructed to disclose

¹³ O.A.C. 4910:1-37-07 (A).

¹⁴ Daymark Audit Report at 1.

¹⁵ M. Schladen, *Ohio House Speaker, four others arrested amid massive dark-money, pay-to-play allegations*. Ohio Capital Journal (July 21, 2020).

¹⁶ Daymark Audit Report at 1.

who at FirstEnergy said what about the lack of access to records. And Daymark should be instructed to describe its efforts at the PUCO and at FirstEnergy to obtain the records. Or did such records ever exist? It all seems incredible and too convenient for FirstEnergy.

Without these records the auditor could not adequately evaluate FirstEnergy's compliance with the law on corporate separation. The PUCO should find that this result violates R.C. 4928.17(A)(3) because FirstEnergy failed to maintain a "sufficient" corporate separation plan.

Daymark's audit of FirstEnergy's corporate separation plan was a performance audit, not a financial audit.¹⁷ Nevertheless, financial auditing standards provide useful guidance for a corporate separation plan audit. The Auditing Standards Board of the American Institute of Certified Public Accountants created industry standards for financial audits, known as Generally Accepted Auditing Standards ("GAAS").¹⁸

Under GAAS, a financial auditor's overall objective is to express an opinion on whether a financial statement is presented "fairly" and "free of any material misstatements."¹⁹ This requires an auditor to decide, among other things, whether:

*d. the information presented in the financial statements is relevant, reliable, comparable, and understandable. In making this evaluation, the auditor should consider whether all required information has been included, and whether such information is appropriately classified, aggregated or disaggregated, and presented.*²⁰

¹⁷ Daymark Audit Report at 1.

¹⁸ AICPA Auditing Standards Board, *Generally Accepted Auditing Standards*, AU §150.02 (Dec. 15, 2001).

¹⁹ AICPA, Professional Standards, *Auditor Reporting and Amendments, Including Amendments Addressing Disclosures in the Audit of Financial Statements* (May 2019).

²⁰ *Id.*, AU-C Section 700.15(d) (Emphasis added).

When the subject of the audit fails to include “all required information” to allow the auditor to conclude whether the financial statement was presented fairly, the auditor notes a “deficiency” or a “material weakness,” defined as follows:

A **deficiency** in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct misstatements on a timely basis.²¹

A **material weakness** is a deficiency, or combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented or detected and corrected on a timely basis.²²

*When a material weakness prevents an auditor from determining whether the financial statement contains any misstatements, the auditor pronounces that the financial statement is “unauditable.”*²³ When a financial statement is unauditable, the subject of the audit must provide additional information to put the financial statement into an auditable condition.²⁴

Revised Code Section 117.41 also describes this concept of unauditability as follows:

If the auditor of state or a public accountant auditing a public office determines that the office cannot be audited because its accounts, records, files, or reports have been improperly maintained, the person making the determination may declare the public office to be unauditable. A public office declared to be unauditable shall follow the procedures established by the auditor

²¹ AICPA, Professional Standards, *Communicating Internal Control Related Matters Identified in an Audit*, AU Section 325.05 (Dec. 15, 2009).

²² *Id.*, Section 325.06.

²³ Ohio Auditor of State, *Auditor Faber Declares Franklin Township ‘Unauditable’* (Oct. 6, 2021) (Emphasis added).

²⁴ U.S. Department of Defense Inspector General, *Summary of DoD Office of the Inspector General Audits of DoD Financial Management Challenges* at 1-2 (July 7, 2015) (“DoD OIG audits of those financial statements for FYs 1991 through 2001 identified pervasive and long-standing material weaknesses, which caused those financial statements to be unauditable. * * * DoD recognized the need for financial reporting improvements and published its first Financial Improvement and Audit Readiness (FIAR) Plan in December 2005. The plan provides a process to fix internal controls, correct processes, and obtain an unqualified opinion on DoD’s financial statements.”)

of state to bring its accounts, records, files, or reports into an auditable condition.²⁵

Upon a finding of unauditability, the Ohio Auditor of State requires additional records to bring the financial statement into an auditable condition.²⁶

The following statements in Daymark’s audit report compel the conclusion that FirstEnergy’s corporate separation plan is unauditabile:

<i>The FirstEnergy Utilities violated R.C. 4928.17(A)(3) and O.A.C. 4910:1-37-07 - Auditor’s statements establishing that the FirstEnergy Utilities’ corporate separation plan was unauditabile.</i>	
Page	Auditor’s Statement
1	“[O]ur team could not get access to records of the compliance officer in place during the audit period (2016 through 2020) since that person had been separated from the company prior to the start of the audit.”
5	“[T]here was very little documentation available to Daymark during this audit that went beyond the policy level that was specific to corporate separation.”
5	Daymark found that FirstEnergy was “[w]ithout both well-developed corporate separation documentation and clear evidence of compliance monitoring....”
6	“Daymark noted that the Ohio Companies have no detailed processes and procedural documents addressing corporate separation compliance.”
6	“Based on our interviews, we conclude that FirstEnergy’s approach to compliance is to assume if a violation or hint of one becomes apparent it is taken care of – but there is little ongoing reporting or monitoring to ensure compliance occurs and that process or documentation changes are addressed where needed – the Company’s assumption is that compliance is happening until it is not happening and thus becomes an issue. FirstEnergy should modify this approach so that compliance verification is clear.”
27	“From our interviews and reviewed documents, it does not appear that the Ohio Companies interact much with OAC 4901:1-37 compliance procedures.”
29	“In many cases, FirstEnergy had no Ohio-specific processes or documentation [for corporate separation compliance].”
31	“Daymark noted that the Ohio Companies have no detailed processes and procedural documents surrounding corporate separation compliance.”
32	“[FirstEnergy was] not able to locate systems and processes in place for compliance monitoring and tracking.”

²⁵ R.C. 117.41.

²⁶ *Id.*

FirstEnergy had nearly eight months to provide sufficient information to Daymark for establish auditability,²⁷ yet it failed to do so. As Daymark noted, the “records of the compliance officer in place during the audit period” were not available to the auditor for the entire five-year period from 2016-2020.²⁸ This is the same time period when FirstEnergy was part of the bribery scheme.

As stated, Standard and Poor’s concluded:

We believe these violations at the highest level of the company are demonstrative of *insufficient internal controls* and a cultural weakness. We view the severity of these violations as significantly outside of industry norms and in our view, they represent a material deficiency in the company’s governance.²⁹

Interestingly, Standard and Poor’s use of the word “insufficient” is a form of the same word that is used for corporate separation standards in R.C. 4928.17 and O.A.C. 4910:1-37-07.

“Internal controls” as referenced by Standard and Poor’s is an important concept in financial auditing. The American Institute of Certified Public Accountants defines the term as follows:

Internal control over financial reporting. A process effected by those charged with governance, management, and other personnel, *designed to provide reasonable assurance regarding the preparation of reliable financial statements* in accordance with the applicable financial reporting framework....³⁰

²⁷ The PUCO hired Daymark for the audit on January 27, 2021 and Daymark filed the audit report on September 13, 2021. Daymark Audit Report at 1.

²⁸ Daymark Audit Report at 1.

²⁹ See Khalid, U., *S&P downgrades FirstEnergy following \$1.95B draw on revolving credit facility*, S&P Market Intelligence (Nov. 25, 2020) (Emphasis added).

³⁰ AICPA, *An Examination of an Entity’s Internal Control Over Financial Reporting That Is Integrated With an Audit of Its Financial Statements*. AT §501.02 (2016) (emphasis added).

Standard and Poor’s finding of “insufficient internal controls” and “a material weakness in the company’s corporate governance” speaks volumes about FirstEnergy. This lack of internal controls and poor corporate governance is apparent regarding corporate separation. The fact that all corporate separation compliance records from 2016-2020 were missing shows a complete breakdown in corporate separation compliance and a clear violation of R.C. 4928.17(A)(3). Or were there even adequate records in the first place before they went missing? With the absence of the records, FirstEnergy failed to demonstrate that it had an adequate corporate separation compliance program during this five-year period.

When FirstEnergy borrowed \$2 billion on November 23, 2020, as the H.B. 6 scandal mushroomed, Standard and Poor’s wrote:

*As part of FE’s ongoing investigations, the company identified a material weakness in its internal controls over financial reporting. The company acknowledged it did not maintain an effective control environment. Specifically, the company’s senior management failed to reinforce the need for compliance with the company’s policies and code of conduct, which resulted in inappropriate conduct.*³¹

The PUCO should find that FirstEnergy violated R.C. 4928.17(A)(3) because FirstEnergy failed to demonstrate that it has a corporate separation plan “sufficient” to prevent FirstEnergy Utilities from extending any undue preference or advantage to an affiliate. The PUCO should also find that FirstEnergy violated O.A.C. 4901:1-37-07 by failing to maintain records sufficient to demonstrate compliance with the corporate separation requirements. After all, for 2016-2020, FirstEnergy supposedly (or conveniently) lacked the records, according to the auditor, to show whether it had an adequate and compliant corporate separation program.

³¹ S&P Global Ratings, *FirstEnergy Downgraded to ‘BB’ on About \$2 Billion Revolver Borrowing; Company Remains on Creditwatch Negative* (Nov. 24, 2020) (Emphasis added).

The PUCO should find that FirstEnergy violated R.C. 4928.17(A)(3) because FirstEnergy itself admits to a failure in corporate governance. FirstEnergy issued a news release admitting to “*our material weakness in internal control.*”³² FirstEnergy originally announced its failure in corporate governance in an SEC filing on November 19, 2020, a couple weeks after firing CEO Jones:

Material Weakness in Internal Control Over Financial Reporting Existing as of September 30, 2020

A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of FirstEnergy’s annual or interim financial statements will not be prevented or detected on a timely basis.

We did not maintain an effective control environment as our senior management failed to set an appropriate tone at the top. Specifically, certain members of senior management failed to reinforce the need for compliance with the Company’s policies and code of conduct, which resulted in inappropriate conduct that was inconsistent with the Company’s policies and code of conduct.³³

In fact, it was FirstEnergy’s admission in this same statement of a “material weakness” in internal controls that led Standard and Poor’s to downgrade FirstEnergy’s credit rating.³⁴

The “regulatory compact”³⁵ is the bargain for allowing utilities to operate as monopolies in exchange for government regulation to protect consumers. The regulatory compact breaks

³² FirstEnergy Corp. News Release, *FirstEnergy Taking Decisive Actions to Move the Company Forward* (Feb. 16, 2021) (Emphasis added).

³³ FirstEnergy Corp., Form 10-Q at 84 (Nov. 19, 2020).

³⁴ S&P Global Ratings, *FirstEnergy Downgraded to ‘BB’ on About \$2 Billion Revolver Borrowing; Company Remains on Creditwatch Negative* (Nov. 24, 2020).

³⁵ Rose, Kenneth (2004) Electric Power; Traditional Monopoly Franchise Regulation and Ratemaking. *Encyclopedia of Energy.*, at 288-299.

down if utility management views regulations as bendable and the regulator is lax in enforcing its regulations. Noncompliance seems to be working for FirstEnergy in Ohio, albeit not for the public. The public peril from a broken regulatory compact is described in an article:

The central lesson that emerges from a comparison of the Insull and Enron eras is not so much that we need to strengthen laws on corporate wrongdoing—it is in recognizing that during a financial bubble driven by rapid changes in network industries (e.g., electricity and the Internet) *regulatory officials will inevitably buckle under political pressure and (a) fail to issue new rules that might interfere with the financial "hijinks" and (b) fail to vigorously enforce laws already on the books.*³⁶

Ironically, the utility owner (Samuel Insull) most credited for developing the regulatory compact for electric utility service was later in life charged with business fraud (though acquitted).³⁷

2. The PUCO should find that the FirstEnergy Utilities’ corporate separation plan was insufficient for consumer protection, in violation of R.C. 4928.17(A)(3), because the plan did not cover Ohio-specific corporate separation requirements.

FirstEnergy’s corporate separation plan was also insufficient because the plan only covered FERC Code of Conduct requirements. It failed to fully cover the corporate separation requirements under Ohio law and rules, which are broader than the federal requirements. The auditor noted this problem in the following statements:

<i>The FirstEnergy Utilities violated R.C. 4928.17(A)(3) - Auditor’s statements establishing that the FirstEnergy Utilities’ corporate separation plan was insufficient due to lack of Ohio-specific corporate separation plan requirements.</i>	
Page	Auditor’s Statement
5	“we find that there are areas of compliance planning that need improvement to meet the Ohio specific [corporate separation] requirements.”

³⁶ Henderson, W. and Cudahy, R. (2005) From Insull to Enron: Corporate (Re) Regulation after the Rise and Fall of Two Energy Icons, *Energy Law Journal*, Vol. 26:35 at 37-38 (Emphasis added).

³⁷ *Id.* at 71.

6	“During our interviews, we also learned that FirstEnergy has internally discussed this gap between FERC and OAC 4901 requirements; however, FirstEnergy has not taken any action to address this gap.”
29	“In many cases, FirstEnergy had no Ohio-specific processes or documentation [for corporate separation compliance].”
32	“FirstEnergy needs to build a robust and effective compliance plan solely focused on Ohio’s specific corporate separation requirements.”
103	“Currently, there appears to be a lack of oversight and ongoing monitoring specific to Ohio corporate separation rules.”

Three years ago, auditor Sage found the very same problem in its 2018 corporate separation audit:

The Ohio Companies rely on compliance with the FERC rules to comply with the Ohio Corporate Separation Rules. However, the FirstEnergy FERC rule compliance program does not cover all of the Ohio Corporate Separation Plan Code of Conduct articles.³⁸

Three years later, the PUCO has yet to act on Sage’s 2018 audit for FirstEnergy. The regulatory compact is breaking down.

3. The PUCO should find that the FirstEnergy Utilities’ corporate separation plan was insufficient for consumer protection, in violation of R.C. 4928.17(A)(3), because the plan did not provide for proper training of employees.

FirstEnergy’s corporate separation plan was also insufficient in violation of R.C. 4928.17(A)(3) and the Ohio Administrative Code because the plan did not provide for the proper training of employees. O.A.C. 4901:1-37-05(B)(8) requires that a utility’s corporate separation plan include “planned education and training, throughout the holding company structure, to ensure that the electric utility and affiliate employees know and can implement” corporate separation policies. O.A.C. 4901:1-37-05(B)(9) also requires that employees who have access to

³⁸ *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 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Compliance Audit of the FirstEnergy Operation Companies with the Corporate Separation Audit, Sage Management Consultants, LLC. at 28 (May 14, 2018).

nonpublic electric utility information (i.e., including sensitive customer information) be made aware of policies and procedures regarding the use of that information.

The following statements by the auditor point to FirstEnergy's lack of training on corporate separation requirements:

<i>The FirstEnergy Utilities violated R.C. 4928.17(A)(3) - Auditor's statements establishing that the FirstEnergy Utilities' corporate separation plan was insufficient due to lack of training.</i>	
Page	Auditor's Statement
6	"Targeted training and education are a critical part of an effective compliance plan. FirstEnergy does not offer any specific training targeted at meeting the OAC 4901 compliance requirements."
98	"Based on our review of available documents and interviews, FirstEnergy does not have a separate training program focused on corporate separation requirements laid out in OAC 4901."
100	"Finally, many employees interviewed mentioned that corporate separation aspects of their job were handed down from their supervisors, mentors, or coworkers in what would amount to on-the-job training. As discussed previously, on-the-job training may be incomplete, inconsistent, and potentially even incorrect."

Training is an important element of a corporate separation program, as can be seen by the Ohio Administrative Code requiring training as part of the corporate separation plan. Training is how corporate separation requirements are taught to employees. It also shows employees the importance the company's leadership places on corporate separation programs.

The legal and compliance departments can periodically review the training program to make sure that it accurately and adequately covers all of the corporate separation requirements. When a uniform program is developed in this manner, the utility can be assured that employees are operating from the same base of knowledge and are following the same set of corporate separation rules.

Without adequate training, FirstEnergy employees won't know the corporate separation requirements that they must follow. How convenient for FirstEnergy. Based on the auditor's

statements on the lack of adequate training, the PUCO should conclude that FirstEnergy's corporate separation plan was also insufficient in violation of R.C. 4928.17(A)(3) and the Ohio Administrative Code because it didn't provide for proper training.

4. The PUCO should find that the FirstEnergy Utilities' corporate separation plan was insufficient for consumer protection, in violation of R.C. 4928.17(A)(3), because the plan did not provide for the needed oversight and monitoring.

FirstEnergy's corporate separation plan was also insufficient in violation of R.C. 4928.17(A)(3) because the plan conveniently did not provide for proper oversight and monitoring. Monitoring is an integral aspect of a corporate separation program because this is how the company ensures that employees have learned all of the corporate separation requirements, understand their responsibilities and are applying them correctly. Training and monitoring go hand-in-hand. Training teaches employees about the corporate separation requirements. Monitoring indicates whether employees are applying the requirements correctly and, if not, additional training can be provided.

O.A.C.4901:1-37-04 (D)(8) also makes it clear that the utility has the responsibility to avoid anticompetitive subsidies and use reasonable efforts to protect consumers against unreasonable sales practices, market deficiencies, and market power. The utility's compliance plan is supposed to play a key role in reporting such violations.

The following statements by the auditor establish FirstEnergy's inadequate oversight and monitoring of its corporate separation program:

<i>The FirstEnergy Utilities violated R.C. 4928.17(A)(3) - Auditor's statements establishing that the FirstEnergy Utilities' corporate separation plan was insufficient due to lack of oversight and monitoring.</i>	
Page	Auditor's Statement

5	“No employee or response to Daymark’s requests for information indicated that there had ever been a corporate separation violation raised internally. This could be due to a lack of Ohio-specific corporate separation training or sufficient monitoring and tracking activities.”
5	Daymark found that FirstEnergy was “[w]ithout both well-developed corporate separation documentation and clear evidence of compliance monitoring....”
6	“Based on our interviews, we conclude that FirstEnergy’s approach to compliance is to assume if a violation or hint of one becomes apparent it is taken care of – but there is little ongoing reporting or monitoring to ensure compliance occurs and that process or documentation changes are addressed where needed – the Company’s assumption is that compliance is happening until it is not happening and thus becomes an issue. FirstEnergy should modify this approach so that compliance verification is clear.”
11	“During the audit period, FirstEnergy did not conduct any internal audits on corporate separation. The most recent internal audit was conducted in 2014.”
32	“[FirstEnergy was] not able to locate systems and processes in place for compliance monitoring and tracking.”
32	“We found lack of oversight of day-to-day compliance with corporate separation by Ohio Companies.”
32	“Although the Ohio Companies are obligated to maintain the compliance, FESC takes care of most compliance activities, and the Ohio Companies have little control or oversight over the shared service employees.”
90	“We believe that maintaining CAM alone is not sufficient to prevent cross-subsidization; there needs to be accompanying processes, controls and oversight that actively ensure compliance.”
94	“We find a lack of controls and oversight regarding time entry.”
103	“Currently, there appears to be a lack of oversight and ongoing monitoring specific to Ohio corporate separation rules.”

Monitoring is an integral aspect of a corporate separation program because this is how the company ensures that employees have learned all of the corporate separation requirements, understand their responsibilities and are applying them correctly. Training and monitoring go hand-in-hand. Training teaches employees what the corporate separation requirements are. Monitoring indicates whether employees are applying the requirements correctly and, if not, additional training can be provided.

A proper training and proper compliance program is needed for corporate separation compliance. FirstEnergy’s program was the worst of all possible worlds because it provided neither training nor monitoring. FirstEnergy’s lack of oversight and monitoring is another reason

why FirstEnergy's corporate separation plan was insufficient in violation of R.C. 4928.17(A)(3) and the Ohio Administrative Code. The regulatory compact breaks down when utility management lacks sufficient oversight of corporate separation and the regulator abdicates its role to make utilities accountable.

Even with the folly of the PUCO instructing that the audit would not cover H.B. 6 issues, there is evidence that FirstEnergy was deficient and non-compliant in violation of Ohio corporate separation law and the Ohio Administrative Code. The auditor has documented a FirstEnergy approach to monitoring that seems to be *see no evil, hear no evil, speak no evil*. That is wrong.

B. The PUCO should find that the FirstEnergy Utilities used improper cost allocation methods that cross-subsidized its affiliate and violated consumer protection standards, in violation of Ohio law and rules.

Ohio law and the Ohio Administrative Code are intended to prevent utility cross-subsidization of corporate affiliates at consumer expense. The regulatory principle is that a utility and its non-regulated affiliates should each pay their own way. Consumers that are captive to the utility's monopoly services are supposed to be protected from being charged costs for competitive businesses run by the utility's affiliates. Consumers of the utility monopoly should be charged no more than the costs attributable to providing utility monopoly service.

Also, any costs the utility affiliate can shed gives the affiliate an advantage its competitors do not have. The competitors might go out of business or leave the market in the face of this unfair competition. With fewer suppliers and less competition, the market prices for energy could increase, harming consumers.

The Ohio General Assembly recognized the harms that cross-subsidization could cause. And so, when they enacted S.B. 3 to restructure Ohio's retail electricity market in 1999, they

created a new state policy prohibiting cross-subsidization.³⁹ They also required utilities to implement corporate separation plans with protections against cross-subsidization.⁴⁰ The PUCO adopted rules against cross-subsidization and requiring proper cost allocation practices.⁴¹

The applicable laws and rules provide:

- R.C. 4928.17(A)(1) – a utility must operate under a corporate separation policy that effectuates the state policies in R.C. 4928.02.
- R.C. 4928.17(A)(2) – the corporate separation plan must protect against unfair competitive advantage and the abuse of market power.
- R.C. 4928.17(A)(3) – the plan must protect against extending any undue advantage to an affiliate.
- O.A.C. 4901:1-37-04(A)(1) – the utility and its affiliates shall function independently of each other.
- O.A.C. 4901:1-37-04(A)(1) – cross-subsidies between the utility and its affiliates are prohibited.
- O.A.C. 4901:1-37-04(B) – the utility and its affiliates shall maintain separate books, record and accounts.
- O.A.C. 4901:1-37-04(D)(6) – the utility shall avoid anticompetitive subsidies to its affiliates.

The Daymark audit made the following findings on the issue of utility cross-subsidization:

<i>The FirstEnergy Utilities violated Ohio regulations against cross-subsidies - Auditor's statements establishing that the FirstEnergy Utilities' corporate separation plan violated Ohio law and rules banning cross-subsidization and requiring proper cost allocation.</i>	
Page	Auditor's Statement
14	"Daymark also recommends there be a process in place that enables Ohio Companies' staff to monitor and understand their allocated charges and resolve any

³⁹ R.C. 4928.02(H).

⁴⁰ R.C. 4928.17.

⁴¹ O.A.C. Chapter 4901:1-37.

	disputes. Currently, Ohio Company staff have little visibility into what is being charged to them. Creating a report like the existing monthly budget report from the business services group would be a good starting point. Ohio Company staff should be made aware of and understand all charges that are being allocated to them.”
32	“In the cost allocation process, the Ohio Companies have limited visibility into the charges that are allocated to them and have no process in place for reviewing or disputing those charges.”
36	“From the point of view of FERC and Ohio code compliance, FirstEnergy needs to ensure that regulated and unregulated affiliates are not cross-subsidizing each other either directly or indirectly through shared services.”
82	“It does not appear that any direct Ohio Companies’ staff review the cost allocations they are assigned, nor does the business services group assigned to serve the Ohio Companies review these allocations on a regular basis. There is no formalized process for disputing an allocated charge. To several interviewees’ knowledge, no dispute had taken place during the audit period. It was also stated during numerous interviews that the Ohio Companies have no control over the costs allocated to them by FESC.”
82	“Through interviews we learned that the business services group will dig into any anomaly in actual spending that appears, but do not analyze any items that are close to budgeted spend. This means that a cost that was incorrectly spent but ended up close to budget would not be investigated. * * * [I]f an inappropriate cost was built into the utility budget from the beginning, it may not be investigated either.”
83	“During our review, we learned that the Ohio Companies have little insight into the allocated charges they are receiving from FirstEnergy Service Company. The monthly budget variance reports do not provide details on allocated charges. There is no system in place for the Ohio Companies to review or dispute an allocated charge. Allocated charges are simply passed on to the Ohio Companies with little oversight from Ohio Company staff or even the business services group that works directly with the Ohio Companies.”
87	“It is good to see the use of the direct charge method increasing [but only to 27% by 2020], but this trend appears to have had no effect on reducing reliance on multi-factor, or indirect, allocators. Although the FESC Shared Service Agreement mentions that the Direct Charge allocation factor should be the primary method of charging costs to Ohio Companies, we find this practice being minimally enforced.”
88	“Until a concerted effort is made – especially at the beginning of the accounting period – to question the use of indirect allocators, while promoting the use of direct assignment instead, it is difficult to say whether the Company has met the requirements of the code.”
89	“FirstEnergy did not record clear notes for most of the cost centers that underwent allocation factor changes. In general, numerous change requests had no accompanying explanation. In one instance, also in 2017, a note was made stating that a change should have been made to a cost center allocation back in 2013 but was never changed. It is unclear if there was any follow-up to this error. Since this appeared to be an error that incorrectly excluded the unregulated businesses, it would be important for FirstEnergy to investigate and possibly correct any mischarges.”

90	“While FirstEnergy has maintained a CAM, the CAM lacks enough internal controls and oversight regarding the use of cost allocators and cost allocated to Ohio Companies to prevent cross-subsidization.”
90	“We believe that maintaining CAM alone is not sufficient to prevent cross-subsidization; there needs to be accompanying processes, controls and oversight that actively ensure compliance.”
93	“FirstEnergy should implement a more robust internal process to audit costs allocated to Ohio Companies. Similarly, this process should include the detailed review of cost allocator factors and whether they are appropriately utilized. There also needs to be a process set up to refund customers if FirstEnergy finds any misallocation during the internal audit process. The current cost allocation factor review does not include enough controls or oversight to ensure that the cost allocations are appropriate. For instance, in their 2020 10-K, FirstEnergy stated they had identified vendor payments that had been inappropriately allocated to the Ohio Companies and other utilities over a span of 10 years. These were not identified during any cost allocation reviews.”
94	“We find a lack of controls and oversight regarding time entry.”
94	“Currently, Ohio Company staff have little visibility into what is being charged to them by FirstEnergy Service Company. Creating a report like the existing monthly budget report from the business services group might be a good starting point. The Ohio Company staff should be able to understand what each allocated charge means and why they are being charged for that particular service.”

The audit findings establish that the FirstEnergy Utilities had what Daymark too politely described as “little insight” and “little visibility” into the costs they were allocated from FirstEnergy Service Company.⁴² Daymark also found that the FirstEnergy Utilities “have no process in place for reviewing or disputing those charges.”⁴³ *How convenient for FirstEnergy that it had limited insight and visibility into costs allocated to it and no process for review and dispute.* The regulatory compact breaks down for corporate separation compliance where utilities have “little insight” into the costs they are allocated. Is the regulator an enabler protecting the utility or an enforcer protecting the public?

The FirstEnergy Utilities lacked sufficient knowledge about what costs they were being allocated and, even if they did know, they had no way to dispute the charges. Conditions were

⁴² Daymark Audit Report at 14.

⁴³ Daymark Audit Report at 32.

ripe for cross-subsidization to occur and it did. The FirstEnergy Utilities had a breakdown in complying with Ohio regulations against cross-subsidization. Based on Daymark's findings, the PUCO should rule that FirstEnergy violated all of the Ohio regulations listed above due to FirstEnergy's failure to follow proper cost-allocation practices.

C. The PUCO should find that the FirstEnergy Utilities violated Ohio law and rules on cross-subsidization and cost allocation, to the detriment of consumers, by charging costs to the FirstEnergy Utilities with: (1) some of the costs for \$60 million in payments to Generation Now in the tainted 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.

As noted above, corporate separation law requires that: "the utility [shall] not extend any undue preference or advantage to any affiliate."⁴⁴ Corporate separation law requires that an affiliate of the utility must fund its operations independently.⁴⁵

FirstEnergy committed violations of corporate separation law and rules by improperly charging the FirstEnergy Utilities for costs that were not for public utility service.⁴⁶ FirstEnergy improperly charged the FirstEnergy Utilities for several items. One item was a portion of the \$60 million in payments to Generation Now to benefit a legislator for help in passing H.B. 6.⁴⁷

⁴⁴ R.C. 4928.17.(A)(3).

⁴⁵ U.S. Senate, Electric Power Industry Competition Legislation: Hearings Before the Committee on Energy and Natural Resources, Statement of the Plumbing-Heating-Cooling Contractors National Association at 294 (April 2000).

⁴⁶ For discussion of costs that were not for public utility service, see, generally *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 22, 2021). (identifying the \$4.3 million payment to a public official as political spending in support of H.B. 6, and identifying the millions of dollars paid to a public official through Generation Now as part of the scheme to pass nuclear legislation that benefitted FirstEnergy Corp.)

⁴⁷ *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*, Deposition of Santino Fanelli at 129-130 (Mar. 9, 2021) (testifying that political and charitable spending costs involving Generation Now payments were allocated to the Ohio companies). .; see also *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1629-EL-RDR, Case No. 20-1629-EL-RDR, Compliance Audit of the 2020 Delivery Capital Recovery (DCR)

Another item was a “FirstEnergy Corp. payment of \$4,333,333, made on January 2, 2019 under a consulting agreement with Sustainability Funding Alliance (“SFA”) [entity associated with former PUCO Chair Randazzo], which the DPA indicates was political spending in support of House Bill 6.”⁴⁸ And the third was for ten years of additional misallocated costs charged to the FirstEnergy Utilities.

As stated, the full extent of such types of improper charges is not known. That’s because the PUCO instructed the auditor to exclude from the audit the issues involving FirstEnergy and tainted House Bill 6.

D. The PUCO should find that the FirstEnergy Utilities violated state rules for corporate separation and consumer protection with their approach to branding and shared employees.

In Case No. 20-103-EL-AGG, OCC and NOPEC argued that FirstEnergy Advisors’ certificate application did not adequately address the issues of shared management and use of the “FirstEnergy” name. The PUCO’s Order specifically deferred “issues regarding [FirstEnergy Advisors’] use of the trade name and compliance with corporate separation requirements by FirstEnergy Corp. affiliates” to this Corporate Separation Audit Case.⁴⁹

Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, Expanded Audit Report at Table 24 at 27 (Auditor finding that a payment of \$355,800 to Generation Now was “unsupported” but nonetheless classified in part as capital investment and charged to FirstEnergy consumers through the 2017 Rider DCR and the Pole attachment charges). (Aug. 3, 2021).

⁴⁸ *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).

⁴⁹ *In the Matter of the Application of Suvon LLC d/b/a FirstEnergy Advisors for Certification of a Competitive Retail Electric Service Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Order at ¶ 20 (Apr. 22, 2020).

As the PUCO deferred such issues to the present case, it is past time for the PUCO to address them. Recently, the PUCO allowed FirstEnergy to withdraw its certificate application for FirstEnergy Advisors and closed that case.⁵⁰ That does not mean, however, that the issues are moot.

The Daymark audit findings show that FirstEnergy violated Ohio law on branding and shared service employees. It is stated in the audit report that, although FirstEnergy Advisors appears on the organizational chart to be a separate affiliate, all employees of FirstEnergy Advisors are employees of FirstEnergy Service Company.⁵¹ Daymark recommended that FirstEnergy Advisors should be separated into its own organization within FirstEnergy and not be considered a part of FirstEnergy Service Company.⁵² Daymark also found that, although the PUCO has allowed shared employees in the past, sharing employees with FirstEnergy Advisors is different. That's because FirstEnergy Advisors is providing a competitive service and could obtain competitive advantages through the shared employees.⁵³

In this regard, auditor Sage wrote in its 2018 audit that:

The assignment of FES CRES [FirstEnergy Advisors] retail sales and service responsibility to the Service Company and the designation of FES CRES sales and service leaders as Shared Services Employees is *highly inappropriate*.⁵⁴

Sage found that the regulated FirstEnergy Utilities violated the corporate separation statute (R.C. 4928.17) and the PUCO's corporate separation code of conduct (O.A.C. Chapter 4901:1-37). FirstEnergy's violations were in two significant respects: (1) by sharing the

⁵⁰ *Id.*, Order at ¶¶ 13-14 (Nov 3, 2021).

⁵¹ Daymark Audit Report at 70.

⁵² *Id.*

⁵³ *Id.* at 70-71.

⁵⁴ Sage Audit Report. at 34.

FirstEnergy name and logo with their non-regulated affiliate (then FirstEnergy Solutions) in violation of O.A.C. 4901:1-37-04(D)(7); and (2) by sharing *a single senior officer* with their non-regulated affiliate (then FirstEnergy Solutions) through their shared affiliate, FirstEnergy Service Company, in violation of O.A.C 4901:1-37-04(D)(3). Once again FirstEnergy was informed of inappropriate activity but chose to ignore it – and FirstEnergy’s regulator (PUCO) chose not to enforce it.

Enforcing the corporate separation laws and rules and/or strengthening the corporate separation plan is particularly important with regard to the sharing or co-mingling of senior management. Neither the FirstEnergy utilities nor FirstEnergy Advisors has explained how the same managers who run the regulated utilities can also run the unregulated competitive affiliate. FirstEnergy Advisors cannot separate its knowledge of the regulated business operations and market information from its knowledge of the affiliate’s business, operations and market information. In fact, real separation cannot occur to protect competitive markets and consumers that benefit from these markets when functioning properly.

Regarding marketing and branding using the “FirstEnergy” name, Daymark found that there is an “opportunity for improvement” for how FirstEnergy markets its services.⁵⁵ Referring to FirstEnergy Products, Daymark found that the FirstEnergy name should be removed from marketing materials and activities because it capitalizes on FirstEnergy’s reputation.⁵⁶ Sage also reported similarly that another affiliate’s (FirstEnergy Solutions) use of the FirstEnergy name may

⁵⁵ Daymark Audit Report at 76.

⁵⁶ *Id.*

have led to its successful competitive retail electric service offering. And Sage recommended that, to eliminate affiliate bias, FirstEnergy's name should not be used by its affiliate⁵⁷

Sage also wrote that there is a link to an affiliate's website from the FirstEnergy Ohio utilities' website, which could be construed as an endorsement of the affiliate's services by the Ohio companies. In this regard Sage recommended removing the links between the FirstEnergy Utilities' website and the FirstEnergy affiliate.⁵⁸ Daymark further found that disclaimers on marketing materials were not highly visible, confusing customers who may think the offering is actually the utility's offering. Daymark stated "[t]his is an advantage that other providers of the same services do not have."⁵⁹ Although Daymark discussed FirstEnergy Products in the trade name context, the same reasoning should apply to FirstEnergy Advisors.

FirstEnergy's use of the "FirstEnergy" name for its competitive businesses can mislead customers who are making choices in the electric market, contrary to R.C. 4928.10. Use of a name so closely aligned with the FirstEnergy Utilities is akin to deceptive advertising. In this regard, R.C. 4928.10 prohibits, *inter alia*, unfair, deceptive sales and marketing practices. State rules, set forth in O.A.C. 4901:1-37-04(D)(8), require utilities to use reasonable efforts to protect consumers against unreasonable sales practices.⁶⁰

The risks to customers go beyond customer confusion and can extend to cross-subsidization from the utilities to FirstEnergy Advisors' use of the FirstEnergy name. Additionally, FirstEnergy Advisors increases its own recognition among consumers by using the name or logo of FirstEnergy.

⁵⁷ Sage Audit Report at 98.

⁵⁸ *Id.* at 99.

⁵⁹ Daymark Audit Report at 73, 76.

⁶⁰ See also the Ohio Consumer Sales Practices Act, R.C. Chapter 1345, *et al.*, that protects customers from unfair or deceptive acts or practices in connection with consumer transactions.

In these circumstances, FirstEnergy utilities have a heightened incentive to overinvest in brand-building and goodwill, with regulated consumers at risk of paying for that. Additionally, competition may be harmed because FirstEnergy Advisors has an advantage that cannot be met by competitors – that advantage is the use of the name and highly recognizable FirstEnergy logo that was especially developed through utility service. This can create higher cost for the industry and higher prices for consumers.

And to the detriment of consumers, greater market concentration and less competition can also be a consequence. Harm to the retail electric competitive market harms consumers because they rely on the market for lower prices and greater innovation.

The PUCO should find that FirstEnergy violated Ohio corporate separation law as to branding and use of shared service employees.

E. The PUCO should impose significant forfeitures for the profound level of FirstEnergy’s violations of corporate separation and it should fashion remedies to prevent future violations of corporate separation laws and rules.

The “greatest bribery, money-laundering scheme in Ohio’s history” was enabled in part by a breakdown in FirstEnergy’s compliance with Ohio corporate separation laws and rules. The PUCO should find that FirstEnergy violated various provisions of R.C. 4928.17 and the state rules adopted under that section, as explained above. The PUCO should exercise the authority it has under R.C. 4928.18 to remedy the violations previously discussed.

Under R.C. 4928.18, the PUCO has broad authority to remedy corporate separation violations. That law reads as follows:

(C) In addition to any remedies otherwise provided by law, the commission, regarding a determination of a violation pursuant to division (B) of this section, may do any of the following:

(1) Issue an order directing the utility or affiliate to comply;

(2) Modify an order as the commission finds reasonable and appropriate and order the utility or affiliate to comply with the modified order;

(3) Suspend or abrogate an order, in whole or in part;

(4) Issue an order that the utility or affiliate pay restitution to any person injured by the violation or failure to comply;

(D) In addition to any remedies otherwise provided by law, the commission, regarding a determination of a violation pursuant to division (B) of this section and commensurate with the severity of the violation, the source of the violation, any pattern of violations, or any monetary damages caused by the violation, may do either of the following:

(1) Impose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation. The recovery and deposit of any such forfeiture shall be subject to sections [4905.57](#) and [4905.59](#) of the Revised Code.⁶¹

1. The PUCO should assess the forfeitures allowed by law for corporate separation violations, including for the FirstEnergy Utilities' insufficient and unauditible corporate separation plan. The forfeitures should be paid to the state treasury.

FirstEnergy's corporate separation plan has been shown to be insufficient as to cost allocation methods, training, monitoring and recordkeeping. It is astounding and outrageous that FirstEnergy, a large corporation part of a multi-state utility operation, is unable to produce records of corporate separation compliance for the five-year period from 2016 through 2020 and is, in essence, unauditible.

FirstEnergy must be made culpable for its violations. The PUCO should impose penalties, including forfeitures, that fit the offense. R.C. 4905.57 provides that "[m]oneys

⁶¹ R.C. 4928.18(C)-(D)(1).

recovered by such actions shall be deposited in the state treasury to the credit of the general revenue fund.”

The PUCO should impose the maximum forfeiture for FirstEnergy’s failure to provide a sufficient (and auditable) corporate separation plan. The law authorizes the PUCO to “impose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation.”⁶² In assessing the forfeiture, the PUCO must weigh “the severity of the violation, the source of the violation, any pattern of violations, or any monetary damages caused by the violation.”⁶³ For the violations of having an insufficient corporate separation plan as OCC has described during the period of January 1, 2016 through November 1, 2021, OCC preliminarily recommends that a range of \$26,612,500 to \$53,225,000 should be imposed (at \$12,500 to \$25,000 per day).⁶⁴ This figure is reasonable under the law considering the severity of the violation for the lack of sufficient (and auditable) corporate separation records.

In total, OCC recommends a range of forfeitures from \$55,475,000 to \$110,950,000 related to the severe and continuous corporate separation violations. OCC will likely recommend additional forfeitures upon obtaining further information as this investigation progresses.

The PUCO should impose forfeitures for the FirstEnergy Utilities’ violations of Ohio law and rules on cross-subsidization and cost allocation, to the detriment of consumers. These violations include: (1) charges being booked to the FirstEnergy Utilities and to consumers for some of the costs for \$60 million in payments to Generation Now to pass H.B. 6; (2) a \$4.3

⁶² R.C. 4928.18(D)(1).

⁶³ R.C. 4928.18(D).

⁶⁴ This and other forfeitures should be increased until FirstEnergy is in compliance.

million payment to the former PUCO Chair; and (3) ten years of other misallocated costs.⁶⁵

FirstEnergy's initial payment to Generation Now occurred on March 16, 2017.⁶⁶ That payment was then allocated in part to the FirstEnergy Ohio Utilities. It resulted in consumers of the regulated utilities subsidizing FirstEnergy's affiliate, FirstEnergy Solutions, that stood most to benefit under tainted H.B. 6.

A fine of \$12,500 to \$25,000 per day should be imposed from March 16, 2017 through the date when the FirstEnergy Utilities finally disclosed to the PUCO (and parties) that they had booked charges for tainted H.B. 6 payments. March 16, 2017 is the date of FirstEnergy's initial payment to Generation Now and should reflect when the payments to Generation Now were initially charged to the FirstEnergy Utilities. Note that the FirstEnergy Utilities did not disclose these charges when filing their September 30, 2020 response to the PUCO's Show-Cause Entry. August 6, 2021 is the date when the FirstEnergy Utilities disclosed to the PUCO that they had booked charges for tainted H.B. 6 payments. For the period of March 16, 2017 to August 6, 2021, OCC preliminarily recommends a total forfeiture for this violation in a range of \$20,025,000 to \$40,050,000 (at \$12,500 to \$25,000 per day).

FirstEnergy misallocated other costs to the FirstEnergy Utilities over a period of ten years or longer.⁶⁷ OCC's comments in the delivery capital recovery rider case discuss the remedy for refunding this amount to consumers with interest and the PUCO's general authority to impose forfeitures under R.C. 4905.54. But in that DCR case OCC does not discuss penalties for

⁶⁵ These activities were discussed in detail in the audit of the FirstEnergy Utilities' delivery capital recovery rider, Case No. 20-1629-EL-RDR.

⁶⁶ *U.S. v. Householder*, Case No. 1:20-cr-00077-TSB, Complaint at 15 (July 21, 2020).

⁶⁷ See footnote 50, *supra*.

corporate separation violations.⁶⁸ *As noted above, under R.C. 4928.18(D), the remedies for corporate separation violations are “[i]n addition to any other remedies provided by law.”*

A reasonable forfeiture for these corporate separation violations would be \$1,000 per day during the ten-year period. Applying a fine of \$500 to \$1,000 per day for a ten-year period, OCC preliminary recommends the total forfeiture for this violation is \$1,825,00 to \$3,650,000.

FirstEnergy also seemingly violated corporate separation law relating to FirstEnergy Advisors, FirstEnergy also violated corporate separation law (including provisions on shared management and branding) relating to FirstEnergy Advisors, as discussed above. The PUCO should calculate this forfeiture from April 22, 2020, the date when the PUCO approved FirstEnergy Advisors’s application as an aggregator (Case No. 20-103-EL-AGG), until November 3, 2021, the date of the PUCO’s Order vacating its original approval. Applying a range of forfeitures of \$12,500 to \$25,000 per day, OCC preliminarily recommends that the appropriate forfeiture for this violation is within a range of \$7,012,500 to \$14,025,000.

Therefore, OCC’s preliminary recommendation is for the PUCO to order the FirstEnergy Utilities to forfeit \$55,475,000 to \$110,950,000 to the state treasury. This forfeiture is subject to further OCC recommendations for adjustments to the figures and for additional forfeitures, as this investigation progresses.

- 2. The PUCO should require the FirstEnergy Utilities to set aside \$20 million for protection of at-risk consumers, with the funds dedicated to bill payment assistance and utility debt relief for low-income and working-poor residential consumers – with program details subject to agreement between FirstEnergy and the Ohio Consumers’ Counsel.**

As a counterpoint to the harm to the Ohio public caused by FirstEnergy, the PUCO should order that \$20 million is to be set aside by the FirstEnergy Utilities for bill payment

⁶⁸ *Id.*, OCC Comments at 9-13 (Oct. 4, 2021).

assistance and utility debt relief to at-risk residential consumers. R.C. 4928.02(L) contains state policy for protecting “at-risk populations.” The funds are especially needed as a result of the added burden, including financial, for those already struggling with poverty and for the working poor as a result of the pandemic. Program details should be subject to agreement between (and resolved by) FirstEnergy and the Ohio Consumers’ Counsel.

- 3. The PUCO should require the FirstEnergy Utilities to submit an acceptable corporate separation plan within three months. The PUCO should arrange an independent monitor, accountable to an independent oversight committee, to oversee the FirstEnergy Utilities’ implementation of the new corporate separation plan.**

The PUCO should order FirstEnergy to submit an acceptable and lawful corporate separation plan that complies with Ohio law and PUCO rules within three months. The PUCO should arrange an independent monitor and an independent oversight committee to oversee FirstEnergy’s implementation of its corporate separation plan. FirstEnergy’s internal audits of its corporate separation plan should be shared with the PUCO and consumer representatives.

The PUCO should conduct periodic audits of FirstEnergy’s corporate separation, using different external auditors over time. The PUCO is authorized to “issue an order directing the utility or affiliate to comply” under R.C. 4928.18(C)(1).

- 4. The PUCO should order the following regulations for consumer protection. The PUCO should bar FirstEnergy Advisors from using the FirstEnergy logo and name. FirstEnergy Advisors (and any similar FirstEnergy subsidiary) should be barred from providing competitive retail electric service in Ohio for five years. The PUCO should bar the arrangement between the Utilities and FirstEnergy Products.**

- a. Bar the affiliates’ use of FirstEnergy logo and name.**

After the Supreme Court threw out the illegal PUCO process of FirstEnergy Advisor’s certificate case, FirstEnergy Advisors withdrew its application (and belatedly revealed a

shocking text message about its certification case).⁶⁹ FirstEnergy committed corporate separation violations in branding and use of shared services employees, as discussed earlier.

If FirstEnergy Advisors or a similar affiliate is ever allowed to operate in Ohio (which should be denied for five years), it should be barred from using the FirstEnergy name. The original auditor in this case, Sage, recommended against allowing such use of the FirstEnergy name.⁷⁰ So, the Daymark and Sage audit reports both recommended against allowing FirstEnergy Advisors to use the FirstEnergy name. The PUCO should heed the recommendations of both auditors, who concurred on this point. At least one state, Illinois, precludes an affiliated retail electric supplier from using the name or logo of the public utility.⁷¹ Ohio should follow that lead.

b. Five-year stay-out for FirstEnergy Advisors.

The PUCO should bar FirstEnergy Advisors, and any FirstEnergy Utilities affiliate or subsidiary, from providing competitive retail electric services in this state for a period of five years. That is appropriate, given what appear to be violations of corporate separation law (R.C. 4928.17) intermingled with violations of *ex parte* law (R.C. 4903.081). Those apparent violations came to light when, after the PUCO's certification process and the Supreme Court's processes were done, FirstEnergy Advisors revealed on remand a thread of shocking test messages. And it self-servingly asked the PUCO for a "fresh start."⁷²

The shocking texts included:

⁶⁹ *In the Matter of the Application of Suvon LLC d/b/a FirstEnergy Advisors for Certification of a Competitive Retail Electric Service Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Order at ¶ 20 (Apr. 22, 2020).

⁷⁰ Sage Audit Report at 98-99.

⁷¹ 83 Ill. Adm. Code 412.105.

⁷² *In the Matter of the Application of Suvon, LLC d/b/a/ FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-130-EL-AGG, Motion to Withdraw the Certification Application of Suvon, LLC, Memorandum in Support at 6 (Nov. 2, 2021).

Dennis Chack: Any luck on talking with Sam on energy license we just received request for additional comments

Charles Jones: He will get it done for us but cannot just jettison all process. Says the combination of over ruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us He'll move it as fast as he can. Better come up with a short term work around.

Dennis Chack: Ok thanks for discussing with him. ***⁷³

c. Bar the FirstEnergy Utilities' arrangement with FirstEnergy Products.

Daymark also focused on FirstEnergy Products ("FEP") offering nonregulated products and services to captive utility consumers by using the FirstEnergy Utilities' communications and marketing channel known as FirstEnergy Home.⁷⁴ FEP also can bill for its products and services, and collect for them, through the utility's bill, an advantage that other competitive service providers do not share.⁷⁵ FEP benefits from these utility services and utility consumers receive no benefit from FEP's use of utility resources.

Daymark therefore recommended that the PUCO approve a profit-sharing mechanism. The mechanism would provide utility consumers with a share of the profits from FEP's use of these services, including use of warm transfers of potential customers from the call center.⁷⁶

Daymark is too kind. The PUCO should bar the FirstEnergy Utilities from the arrangement with FirstEnergy Products.

⁷³ *Id.* Exhibit.

⁷⁴ Daymark Audit Report at 71.

⁷⁵ *Id.*

⁷⁶ *Id.*

But, if the PUCO permits the FirstEnergy Utilities to continue allowing FirstEnergy Products to lean on them (and consumers), then OCC recommends as follows. Daymark's profit-sharing recommendation should be adopted as at least lessening the unreasonableness of the current arrangement for utility consumers and for competitors of FEP. The PUCO should approve a profit-sharing mechanism, with at least 20% of the profits going to consumers. The profit-sharing should be made retroactive to the date FirstEnergy Products began using the FirstEnergy utility resources.

As noted above, the PUCO is authorized under R.C. 4928.18(C)(1) to "issue an order directing the utility or affiliate to comply." The PUCO should order FirstEnergy to comply with its directives regarding branding and use of shared services employees for competitive services.

5. A supplemental audit of the FirstEnergy Utilities' corporate separation should be ordered to encompass FirstEnergy's tainted House Bill 6 activities including its relationship with the former PUCO Chair and with any other PUCO personnel (if any are identified by the auditor) involved in that relationship.

OCC and NOPEC asked the PUCO (in joint motions filed on November 5, 2021) to lift the unwarranted constraint of excluding tainted H.B. 6 issues from this audit. Accordingly, the PUCO should conduct a supplemental audit.⁷⁷ OCC incorporates here the recommendations from the OCC-NOPEC Joint Motions as filed in this case.

The supplemental audit should include an investigation of FirstEnergy's H.B. 6-related activities. That scope should include FirstEnergy's relationship with former PUCO Chair Randazzo and with any other PUCO personnel (if any are identified by the auditor) involved in that relationship. The supplemental audit's time period should be as follows. It should begin

⁷⁷ *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 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Motion for Supplemental Audit, Motion to Extend Deadlines for Comments, Reply Comments and Hearing-Related Matters, Request for Expedited Ruling and Memorandum in Support by Office of the Ohio Consumers Counsel and Northeast Ohio Public Energy Counsel (Nov. 5, 2021).

with January 1, 2017 (the beginning date for the PUCO's investigation, as ruled by the Attorney Examiner⁷⁸) and continue through the present date because corporate separation problems could be ongoing.

The supplemental audit should include an independent committee to oversee the auditor's work. The PUCO should also order FirstEnergy to make available all records of the former compliance officer that were not previously provided to the auditor. Subpoenas would be in order if FirstEnergy is uncooperative.

III. CONCLUSION

Corporate separation protects consumers from being charged by their monopoly utility (through cross-subsidization) for "extend[ing] any undue preference or advantage to any affiliate, division, or part of its own business....," per R.C. 4928.17(A)(3). Proper corporate separation requires a strong commitment by utility management. But the commitment to good governance by FirstEnergy's senior management has been lax. Indeed, the highest level of senior management was fired as a result of the recent scandals, including the compliance officer for corporate separation.

The "regulatory compact"⁷⁹ is the bargain for a state to allow utilities to operate as monopolies in exchange for government regulation to protect consumers. The bargain breaks down if utility management views regulations as bendable and the regulator is lax in enforcing its regulations. The public peril from a broken regulatory compact is described in an article:

⁷⁸ *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's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Deposition of Santino L. Fanelli at 257 (Mar. 10, 2021).

⁷⁹ Rose, Kenneth (2004) Electric Power; Traditional Monopoly Franchise Regulation and Ratemaking. *Encyclopedia of Energy*., at 288-299.

The central lesson that emerges from a comparison of the Insull and Enron eras is not so much that we need to strengthen laws on corporate wrongdoing-it is in recognizing that during a financial bubble driven by rapid changes in network industries (e.g., electricity and the Internet) *regulatory officials will inevitably buckle under political pressure and (a) fail to issue new rules that might interfere with the financial "hijinks" and (b) fail to vigorously enforce laws already on the books.*⁸⁰

For Ohioans, it's time to fix the broken bargain of Ohio's regulatory compact with FirstEnergy.

OCC recommends the following for consumers of the FirstEnergy Utilities:

- The PUCO should find that the FirstEnergy Utilities' corporate separation plan is insufficient in violation of R.C. 4928.17(A)(3) and O.A.C. 4902:1-37-07(A).
- The PUCO should find that the FirstEnergy Utilities' corporate separation plan is unauditale.
- The PUCO should find that the FirstEnergy Utilities used improper cost allocation methods that cross-subsidized an affiliate in violation of Ohio corporate separation laws and rules.
- The PUCO should find that the FirstEnergy Utilities violated corporate separation law and rules as a result of the FirstEnergy Utilities being charged with: (1) some of the costs for \$60 million in payments to Generation Now; (2) a \$4.3 million payment to the former PUCO Chair; and (3) ten years of misallocated.
- The PUCO should find that the FirstEnergy Utilities violated corporate separation requirements by their branding practices and their common use of shared employees.
- The PUCO should order a supplemental audit of whether any of FirstEnergy's H.B. 6 activities violated corporate separation requirements (separate motion filed by OCC & NOPEC).
- The PUCO should impose forfeitures commensurate with the seriousness of the offenses. OCC preliminarily recommends forfeitures of \$55,475,000 to \$110,950,000.

⁸⁰ Henderson, W. and Cudahy, R. (2005) From Insull to Enron: Corporate (Re) Regulation after the Rise and Fall of Two Energy Icons, *Energy Law Journal*, Vol. 26:35 at 37-38. (Emphasis added).

- The PUCO should require FirstEnergy to pay \$20 million for bill payment assistance and utility debt relief to at-risk residential consumers.
- The PUCO should require FirstEnergy to submit an acceptable and auditable corporate separation plan within three months and appoint an independent monitor, with an independent oversight committee, to oversee implementation of the plan).
- The PUCO should bar affiliates' use of the FirstEnergy logo and name.
- The PUCO should impose a five-year stay-out period for FirstEnergy Advisors and any other FirstEnergy affiliate or subsidiary barring them from offering competitive services during that time.
- The PUCO should bar FirstEnergy Products from using the FirstEnergy Utilities' resources to offer their products and services or, in the alternative, impose a profit-sharing mechanism where consumers receive at least 20% of the profits.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis
Maureen R. Willis (#0020847)
Senior Counsel
Counsel of Record
John Finnigan (#0018689)
Assistant Consumers' Counsel

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(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Comments served upon the persons listed below by electronic transmission this 22nd day of November 2021.

/s/ Maureen R. Willis
Maureen R. Willis
Senior Counsel
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Jacqueline.st.john.puco.ohio.gov

From: [Mccarter, Doris](#)
To: "Marie Fagan"
Subject: RE: RFP RA20-CA-X, questions
Date: Friday, November 13, 2020 4:16:00 PM
Attachments: [image002.png](#)

I am so sorry. I forgot. Actually, it has to be for the whole period because we want the entire corporate separation audit and Sage was only a subset of the corporate separation rules, with a heavy focus on Code of Conduct.

Doris E. McCarter

Grid Modernization and Retail Markets Division
Rates and Analysis Department
Public Utilities Commission of Ohio
180 East Broad Street, 3rd Floor
Columbus, Ohio 43215
Doris.mccarter@puco.ohio.gov

From: Mccarter, Doris
Sent: Friday, November 13, 2020 4:07 PM
To: Marie Fagan <marie@londoneconomics.com>
Subject: RE: RFP RA20-CA-X, questions

Hello.

The answers to your first and second questions are, "No." This is a standard corporate separation audit.
The answer to the third question is that you do not need to audit the time period of the Sage audit, just the time period before and after it.

Doris E. McCarter

Grid Modernization and Retail Markets Division
Rates and Analysis Department
Public Utilities Commission of Ohio
180 East Broad Street, 3rd Floor
Columbus, Ohio 43215
Doris.mccarter@puco.ohio.gov

From: Marie Fagan <marie@londoneconomics.com>
Sent: Friday, November 13, 2020 2:04 PM
To: Mccarter, Doris <doris.mccarter@puco.ohio.gov>
Subject: RFP RA20-CA-X, questions

Dear Ms. McCarter,
London Economics is pleased to have the opportunity to bid on RFP RA20-CA-X. Related to that, we have a handful of questions:

- 1) Does the audit requested in RFP RA20-CA-X include the item in paragraph 12 of the Commission's Entry of November 4, 2020 in Case No. 17-974-EL-UNC? In other words, does it include an audit of the Distribution Modernization Rider ("DMR"), to examine whether FirstEnergy improperly used funds collected in the DMR?
- 2) Does the audit requested in RFP RA20-CA-X include the item in paragraph 15 of the Commission's Entry of November 4, 2020 in Case No. 17-974-RL-UNC? In other words, does it include an audit of whether the source of funds for political and charitable spending by the Companies in support of Am. Sub. H.B. 6 was from rates or charges paid by Ohio ratepayers?
- 3) The audit requested in RFP RA20-CA-X will cover the period November 1, 2016 through October 31, 2020; this period encompasses the period (June 28, 2017 through February 28, 2018) which was included in a previous audit of FirstEnergy's compliance with corporate separation rules performed by Sage Management Consultants, LLC and published May 14, 2018 in Case No. 17-0974-EL-UNC ("Sage Report"). Does audit requested in RFP RA20-CA-X include a detailed audit and re-examination of the time period already covered in the Sage Report? Or does the audit requested in RFP RA20-CA-X envision that the consultant will limit its activities with respect to the June 28, 2017- February 28, 2018 time period to reviewing and commenting on the Sage Report, and focus its detailed audit on the time periods before and after the Sage Report time period?

Many thanks,
Marie Fagan



Marie Fagan, PhD
Chief Economist
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London Economics International, LLC ("LEI") is an economic and financial consulting company with two decades of experience advising both private and public entities in energy and infrastructure markets. LEI publishes bi-annual market reviews of all US and Canadian regional power markets available at www.londoneconomicspress.com.

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From: [Mccarter, Doris](#)
To: [Fieldman, Alyson](#)
Cc: [Wiefling, Guler Ann](#); [Molter, Lindsey](#)
Subject: RE: RFP Clarification Questions
Date: Friday, November 20, 2020 9:30:00 AM

Hello Everyone,

The Order language was just to give background around various other proceedings occurring at the PUCO. That text refers to another case. The audit that will be the subject of this case is a traditional corporate separation audit.

I need an overall cost (cap) from you. However, I will still need that broken down by specific task areas, hours per tasks, person/cost per hour per task. Such a breakdown informs me as to the level of effort going into the audit, the areas of effort, the competencies engaged in the areas of review and also your understanding of/approach to the audit.

The hearing costs can be delineated as a per hour charge, since it is unknown if a further proceeding will be needed. Please be certain to make it a separate section of your bid.

Doris E. McCarter

[Grid Modernization and Retail Markets Division](#)
[Rates and Analysis Department](#)
[Public Utilities Commission of Ohio](#)
[180 East Broad Street, 3rd Floor](#)
[Columbus, Ohio 43215](#)
Doris.mccarter@puco.ohio.gov

From: Fieldman, Alyson <Alyson.Fieldman@marcumllp.com>
Sent: Friday, November 20, 2020 8:36 AM
To: Mccarter, Doris <doris.mccarter@puco.ohio.gov>; Molter, Lindsey <Zee.Molter@puco.ohio.gov>
Cc: Wiefling, Guler Ann <Guler.Wiefling@marcumllp.com>
Subject: RFP Clarification Questions

Good morning, Ms. McCarter and Ms. Molter,

Marcum LLP will be submitting a proposal in response to the RFP that PUCO has issued as it relates to an audit / investigation of First Energy Corp. We understand from the RFP that one of the engagement's purposes will be to review the company's compliance with the Corporate Separation Rules adopted by PUCO.

Paragraph 15 of the order that PUCO issued on 11/4/2020 regarding this RFP, states that PUCO has "opened proceedings to review whether any political and charitable spending by the Companies in support of Am. Sub. H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state." The RFP, however, does not explicitly include this as an objective of the work to be undertaken by the selected auditor. Does PUCO wish the selected auditor to conduct tests in order

to determine whether such contributions were directly or indirectly paid by ratepayers?

Separately, the RFP on page 2 states that "the proposed costs shall be considered firm prices for performing the work described in the proposal." Can you please clarify whether PUCO is asking for a fixed price for this engagement or whether it is asking for hourly rates by level of resource with such rates remaining constant for the duration of the engagement?

Thank you for your time and we look forward to your response.

Kind regards,
Alyson

Alyson Fieldman
Chief Marketing Strategy Officer
6685 Beta Drive
Mayfield Village, OH 44143
P: (440) 459-5969
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OCC has redacted the "confidentiality" notice that appears on this document received from the PUCO STAFF (including the Marcum Auditing firm), as the document was not deemed confidential by the sender.

Short Message Report

Conversations: 1	Participants: 2
Total Messages: 1	Date Range: 3/3/2020

Outline of Conversations

NODISPLAY 1 message on 3/3/2020 • Charles Jones • Dennis Chack

Messages in chronological order (times are shown in GMT -04:00)



NODISPLAY

DC

Dennis Chack

3/3/2020, 11:23 AM

Any luck on talking with Sam on energy license we just received request for additional comments

Short Message Report

Conversations: 1	Participants: 2
Total Messages: 5	Date Range: 3/4/2020

Outline of Conversations



NODISPLAY 5 messages on 3/4/2020 • Charles Jones • Dennis Chack

Messages in chronological order (times are shown in GMT -05:00)



NODISPLAY

- CJ **Charles Jones** 3/4/2020, 2:57 PM
He will get it done for us but cannot just jettison all process. Says the combination of over ruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us? He'll move it as fast as he can. Better come up with a short term work around.
- DC **Dennis Chack** 3:05 PM
Ok thanks for discussing with him. How are you feeling
- CJ **Charles Jones** 3:09 PM
[REDACTED]
[REDACTED] Stopped by Sam's today on my walk. He has friends down and has been busy but he was out doing some yard work. Walking about 3 miles a day right now. A little bored since I cant golf or even get in the pool. But better than sitting in Ohio. Weather has been beautiful last 3 days.
- DC **Dennis Chack** 3:14 PM
It was not the best the days we were there
- CJ **Charles Jones** 3:14 PM
I know. Pretty chilly and windy.

From: Marie Fagan
To: Christopher, Mahila
Cc: Windle, Rodney
Subject: RE: Draft AEP Ohio OVEC Audit
Date: Tuesday, September 8, 2020 3:42:14 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image007.png](#)

Okay, thanks v much for the head start

From: mahila.christopher@puco.ohio.gov <mahila.christopher@puco.ohio.gov>
Sent: Tuesday, September 8, 2020 2:59 PM
To: Marie Fagan <marie@londoneconomics.com>
Cc: rodney.windle@puco.ohio.gov
Subject: RE: Draft AEP Ohio OVEC Audit

Hi Marie,
Please find attached Staff's initial comments on LEI's latest draft of the AEP Ohio, 2018-2019 PPA rider audit final report. This may help you get a head start on Staff's editorial suggestions. The comments can be discussed further at tomorrow's meeting.

**If you could please note that Staff still needs final acquiescence from PUCO Admin. regarding the overall tone of the draft report!

Staff's main observation regarding the tone of the draft is the following:

- Milder tone and intensity of language would be recommended such as the language on page 10, para 3: "Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers."
- Reduced subjectivity and level of detail/specifics would be required such as the language on page 26, para 2: "HB 6 also provides subsidies for two large nuclear power plants in Ohio, and for that reason is the center of a federal bribery investigation. First Energy Corporation and the company's political action committee, and Generation Now, a 501 (c) (4) non-profit group are charged with paying \$60 million to advocate for the passage of HB 6. The case has led to federal charges against Ohio House Speaker Larry Householder and four associates."

I am attaching a redlined Word version of the draft for your perusal/review. If you could, please take a look and incorporate Staff's comments as far as possible? Please let me know of any questions, comments, and concerns.

Thank you

Mahila Christopher
Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov


This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

From: Christopher, Mahila
Sent: Tuesday, September 8, 2020 1:09 PM
To: Marie Fagan <marie@londoneconomics.com>
Cc: Windle, Rodney <rodney.windle@puco.ohio.gov>
Subject: RE: Draft AEP Ohio OVEC Audit

Hi Marie-

As per the RFP, the Final Report is due to be filed on the 16th of September:

1. Audit Proposals Due February 28, 2020
2. Award Audit March 11, 2020
3. Audit Conducted March 11, 2020 through September 1,
4. 2020 Draft Audit Report Presented to Staff September 1, 2020
5. Final Audit Report Filed with Commission September 16, 2020

Should Staff reach our edits to LEI by 2:00pm today, would it be possible for LEI to send an updated draft to the Company tomorrow?

Thank you

Mahila Christopher
Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov


This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

From: Marie Fagan <marie@londoneconomics.com>
Sent: Tuesday, September 8, 2020 12:29 PM
To: Christopher, Mahila <mahila.christopher@puco.ohio.gov>
Cc: Windle, Rodney <rodney.windle@puco.ohio.gov>
Subject: RE: Draft AEP Ohio OVEC Audit

Okay, will do. Once we have your comments I'll have a good idea of how long it will take to address them, but I would guess we can complete it by the end of the week in any case, and likely sooner than that. So that means we can get the draft to Ed by this Friday 11th or maybe a day or so sooner, at least in electronic format. I think that the week that Ed wants for AEP Ohio review is reasonable, which means that they would get their review back to us by about Sept 18.th We would then address their comments (again, that should take a day or so, unless comments are extensive). Then we would provide you with the final report including workpapers the week of Sept. 21.

Best,
Marie

From: mahila.christopher@puco.ohio.gov <mahila.christopher@puco.ohio.gov>
Sent: Tuesday, September 8, 2020 9:32 AM

To: Marie Fagan <marie@londoneconomics.com>
Cc: rodney.windle@puco.ohio.gov
Subject: FW: Draft AEP Ohio OVEC Audit
Importance: High

Hi Marie,
Staff should be able to communicate our comments on the draft by tomorrow's meeting.
If you could, please assess Edward's question based on this and let me know if you have any concerns with his request for a week to review the draft for confidentiality and factual inaccuracies?

Thank you

Mahila Christopher
Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov


This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

From: Edward J Locigno <ejlocigno@aep.com>
Sent: Tuesday, September 8, 2020 9:19 AM
To: Marie Fagan <marie@londoneconomics.com>
Cc: Andrea E Moore <aemoore@aep.com>; Christopher, Mahila <mahila.christopher@puco.ohio.gov>; Shelli A Sloan <sasloan@aep.com>; Steven T Nourse <stnourse@aep.com>
Subject: RE: Draft AEP Ohio OVEC Audit
Importance: High

Mahila/Marie

When can we expect the report to review for confidentiality and factual inaccuracies? We need a solid week really at least to review it. Please let me know. Thank you!



EDWARD J LOCIGNO | REGULATORY ANALYSIS & CASE MGR
EJLOCIGNO@AEP.COM | D:614.716.3495 | C:614.619.9460
1 RIVERSIDE PLAZA, COLUMBUS, OH 43215

From: Marie Fagan <marie@londoneconomics.com>
Sent: Wednesday, September 2, 2020 3:09 PM
To: Edward J Locigno <ejlocigno@aep.com>
Cc: Andrea E Moore <aemoore@aep.com>
Subject: [EXTERNAL] Draft AEP Ohio OVEC Audit

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Dear Ed,
This is to confirm that LEI provided the draft OVEC audit report to the Commission Staff. The process now, as I understand it, is that Staff will review, and after that we will provide it to AEP Ohio for redacting. At that time, we can talk about a secure way to provide it to you, perhaps uploading to the data room.
Thank you for all your help with the audit.
Best,
Marie



Marie N. Fagan, PhD
Chief Economist
London Economics International
717 Atlantic Ave, Suite 1 A | Boston, MA | 02111
Direct: 1-617-933-7205
Cell 1-617-599-9308
www.londoneconomics.com

London Economics International, LLC ("LEI") is an economic and financial consulting company with two decades of experience advising both private and public entities in energy and infrastructure markets. LEI publishes bi-annual market reviews of all US and Canadian regional power markets available at www.londoneconomicspress.com.

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From: Christopher, Mahila
To: Marie Fagan
Cc: Windle, Rodney
Subject: RE: an edit needed for AEP Ohio OVEC final audit report
Date: Friday, September 11, 2020 1:58:00 PM
Attachments: [image003.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)

Hi Marie,

Thank you for the heads up. Staff would recommend that you share this proposed edit with the Company as well.

Let me know if you have any questions.

Mahila Christopher

Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov



This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

From: Marie Fagan <marie@londoneconomics.com>
Sent: Friday, September 11, 2020 12:17 PM
To: Christopher, Mahila <mahila.christopher@puco.ohio.gov>
Cc: Windle, Rodney <rodney.windle@puco.ohio.gov>
Subject: an edit needed for AEP Ohio OVEC final audit report

Hi Mahila,

I just realized there was an edit I wanted to make to page 10, where we said "However, LEI's analysis shows that the OVEC contract overall is not in the best interest of AEP Ohio ratepayers." that I missed in the last version of the report. I'll edit it when we get the version back from AEP Ohio next week-- I'll delete that sentence and tinker with the rest of the paragraph so it reads smoothly.

Best,

Marie



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Edward J Locigno

From: Steven T Nourse
Sent: Friday, September 11, 2020 3:05 PM
To: Marie Fagan; Edward J Locigno
Cc: Andrea E Moore; Shelli A Sloan; Michael W McCulty
Subject: RE: edit proposed to AEP Ohio OVEC audit report

Glad to hear you are deleting that sentence because we had a similar comment – such an observation is beyond the scope of the audit and as a FERC-approved agreement is beyond the scope of the Commission's authority. The prudence issues involved in the audit relate to AEP Ohio's implementation of the ICPA and not the existence of it. Thanks



STEVEN T NOURSE | VP-LEGAL
STNOURSE@AEP.COM | D:614.716.1608
1 RIVERSIDE PLAZA, COLUMBUS, OH 43215

From: Marie Fagan <marie@londoneconomics.com>
Sent: Friday, September 11, 2020 2:18 PM
To: Edward J Locigno <ejlocigno@aep.com>
Cc: Andrea E Moore <aemoore@aep.com>; Shelli A Sloan <sasloan@aep.com>; Michael W McCulty <mmcculty@aep.com>; Steven T Nourse <stnourse@aep.com>
Subject: [EXTERNAL] edit proposed to AEP Ohio OVEC audit report

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Dear Ed,
I just realized there was an edit I wanted to make to page 10, where LEI said "However, LEI's analysis shows that the OVEC contract overall is not in the best interest of AEP Ohio ratepayers." that I missed. I'll edit it when we get the doc back from you next week. I'm going to delete that sentence and tinker with the rest of the paragraph so it reads smoothly.
Best,
Marie

At the PUCO's request, OCC has redacted the "confidential" label that appears on this document received from AEP, as the document ultimately was deemed not confidential by the sender.



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**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

11/22/2021 5:08:01 PM

in

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

Summary: Comments Initial Comments on Protecting Consumers from Improper Charges Under FirstEnergy's "Corporate Separation" by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.