**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| **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** | **)<br>)<br>)<br>)<br>)<br>)** | **Case No. 17-0974-EL-UNC** |

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**REPLY COMMENTS OF VISTRA CORP.**

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## I. Introduction

The September 13, 2021 Daymark Audit Report identified several violations of Ohio's corporate separation laws and rules, R.C. 4928.17 and O.A.C. Chapter 4901:1-37, by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or the "regulated utilities"). The Daymark Audit Report also made several recommendations to remedy these violations, primarily related to marketing and branding of non-electric products and services and cost allocation. Refreshingly, FirstEnergy largely does not contest the findings or recommendations, and even agrees to implement several of the recommendations.

Vistra Corp. ("Vistra") supports FirstEnergy's decision to adopt many of the Daymark Audit Report's recommendations.[1] However, Vistra is concerned with ensuring the enforceability of FirstEnergy's commitments. To that end, Vistra submits these reply comments and respectfully requests that the Commission: (1) acknowledge FirstEnergy's agreement to adopt the majority of the recommendations in the Daymark Audit Report; and (2) following the evidentiary hearing

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[1] As detailed further below, Vistra reiterates its prior concern that FirstEnergy Service Company's ("FESC") performance of shared corporate services for FirstEnergy's competitive affiliates results in cross-subsidization of competitive supplier activities by regulated utility customers.

scheduled in this matter, issue a compliance order pursuant to R.C. 4928.18(C)(1), with the provisions suggested herein.

## II. The Commission should acknowledge FirstEnergy's agreement to adopt the majority of the recommendations in the Daymark Audit Report.

Vistra notes that FirstEnergy agrees with several recommendations in the Daymark Audit Report. This is an important first step in resolving of this matter and ensuring FirstEnergy's swift and efficient compliance with Ohio's corporate separation laws and rules. Specifically, FirstEnergy has agreed (or at least not objected) to:

1. Build a more robust and effective compliance plan solely focused on Ohio-specific corporate separation requirements, including having clear documentation regarding compliance tasks with identified owners and a simple, well-documented, and communicated change management process; adopting a proactive compliance monitoring and tracking system; and developing a targeted training and education program with comprehensive training for all employees and training focused on affiliate interactions (and how the cost allocation manual ("CAM") applies to such interactions) for upper management.

2. Strengthen structural safeguards related to physical separation and information access limits, including supplementing annual training with additional reinforcement during the year (e.g., signage, spot checks) and monitoring and tracking cross-functional work groups.

3. Emphasize through employee training the requirement to provide a complete list of all competitive retail electric service ("CRES") providers upon customer request.

4. Monitor, report, and track customer complaints.

5. Perform an annual internal audit to ensure that adequate protections are in place to prevent the cross-subsidization of any protected information between FirstEnergy Products ("FEP"), the regulated utilities, and Suvon, LLC ("Suvon") d/b/a FirstEnergy Home.

6. Separate Suvon, including FirstEnergy Advisors and FirstEnergy Home, from FESC and into their own organization within FirstEnergy Corp.[2]

[2] On November 3, 2021, the Commission vacated its April 22, 2020 Finding and Order granting Suvon certification as a CRES provider in Ohio. *Suvon, LLC d/b/a FirstEnergy Advisors*, Case No. 20-0103-EL-AGG, Order on Remand, ¶ 1 (Nov. 3, 2021). However, the Commission did not preclude Suvon from continuing to serve customers under existing contracts or from receiving compensation for such contracts. *Id.* at ¶ 11. Suvon intends to file a new CRES certification application. *Suvon, LLC d/b/a FirstEnergy Advisors*, Case No. 20-0103-EL-AGG, Motion to Withdraw Certification Application, 6 (Nov. 2, 2021).

7. Remove the regulated utilities' names and logos from FEP's marketing materials and activities.

8. Regarding accounting and the CAM:

    a. Include all information required in O.A.C. 4901:1-37-08(D).

    b. Have an updated copy of the entire CAM on hand and readily available.

    c. Update the CAM once a year to ensure it is kept current.

    d. Implement an internal timesheet auditing process to ensure timesheet entries are being properly monitored for compliance.

    e. Develop more robust internal and external cost allocation auditing processes.

    f. Establish a succession plan for compliance officers.

    g. Implement training on charging time and expenses to ensure that employees directly charge their time to a specific affiliate.

Vistra supports FirstEnergy's commitment to implementing the above recommendations. The Commission should likewise recognize FirstEnergy's agreement to these recommendations. In doing so, to narrow the scope of issues at the evidentiary hearing scheduled in this matter, the Commission should encourage FirstEnergy to stipulate beforehand to the agreed recommendations in the Daymark Audit Report.

**III. Following the evidentiary hearing scheduled in this matter, the Commission should issue a compliance order pursuant to R.C. 4928.18(C)(1), with the provisions suggested herein.**

As previously explained, FirstEnergy agrees to several recommendations in the Daymark Audit Report. Accordingly, there is little value in litigating these issues at length at hearing, and the Commission should encourage FirstEnergy to stipulate beforehand to the agreed recommendations. In addition to any outstanding issues, the remainder of this proceeding should focus on how to make FirstEnergy's commitments enforceable.

Under R.C. 4928.18(C), the Commission may, among other remedies, "[i]ssue an order directing the utility or affiliate to comply" with Ohio's corporate separation laws and rules.[3] This language affords significant discretion to the Commission in crafting compliance orders. Ensuring the enforceability of FirstEnergy's promises will depend heavily on the Commission's adopted provisions. Thus, Vistra submits that any compliance order issued in this case should require FirstEnergy to:

1. Conduct regular (e.g., semi-annual or annual) audits by Commission Staff or an independent auditor to ensure FirstEnergy complies with the Commission's rules for corporate separation, and share the audits with stakeholders for review.

2. Submit an implementation plan designed to provide compliance with the recommendations and to establish goals and timetables for compliance. Regarding such implementation plan:

    a. FirstEnergy should provide information and reports to the Commission in a public-facing filing on progress in implementing recommendations.

    b. Stakeholders should be allowed the opportunity to review and comment on FirstEnergy's implementation plan.

    c. The Commission should also approve the implementation plan.

3. Provide Commission Staff with access to books and records upon request to ensure compliance.

4. The Commission should retain jurisdiction so as to, at any time, seek additional enforcement remedies as necessary in the event of noncompliance.

Similar provisions for ensuring compliance have been proposed or adopted in other Commission proceedings and would also be appropriate here.[4]

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[3] R.C. 4928.18(C)(1).

[4] *See, e.g.*, *Verde Energy USA Ohio LLC*, Case No. 11-5886-EL-CRS, Finding & Order, ¶ 25 (Dec. 30, 2020) (regular audits by an independent auditor); *Verde Energy USA Ohio LLC*, Case No. 19-0958-GE-COI, Opinion & Order, ¶ 46 (Feb. 26, 2020) (stakeholder review and comment, and Commission approval for action plan); *Duke Energy Ohio*, Case No. 11-3549-EL-SSO, Opinion & Order, 25, 52 (Nov. 22, 2011) (semi-annual audits by Commission Staff or an independent auditor) (Commission Staff access to books and records); *Ameritech Ohio/Minimum Telephone*, Case No. 99-0938-TP-COI, Opinion & Order, 77 (Jan. 31, 2002) (measuring compliance and evaluating progress through reporting are "essential"); *Columbia Gas of Ohio Incorporated*, Case No. 83-0135-GA-COI, Opinion & Order, 22 (Oct. 8, 1985) (implementation plan with goals and timetables for compliance).

## IV. The Commission should require the FirstEnergy regulated utilities to monitor and understand their allocated charges and resolve any disputes.

While FirstEnergy largely has agreed to implement the recommendations in the Daymark Audit Report, FirstEnergy declines to set up a process for the regulated utilities to monitor and understand their allocated charges and resolve any disputes.[5] According to FirstEnergy, FESC, and not the regulated utilities, is responsible for budgeting and managing the regulated utilities' indirect costs and associated activities.[6] FirstEnergy goes so far as to state that the regulated utilities are not even staffed to perform these functions.[7] FirstEnergy notably states that requiring the regulated utilities to "bear responsibility for monitoring and resolving any errors in the charges allocated to them from FirstEnergy Service Company . . . *would negate the efficiency benefits of having these functions centralized at FirstEnergy Service Company*."[8]

Here FirstEnergy confirms Vistra's concerns regarding cross-subsidization through FESC.[9] FirstEnergy makes clear that FESC's provision of shared corporate services results in efficiencies and, in turn, cost savings. Despite discussing the regulated utilities specifically in its above objection, if such efficiencies and cost savings are true for the regulated utilities, then they must also be true for FirstEnergy competitive affiliates that receive support from FESC. In fact, Daymark confirmed this when it found that FEP and FirstEnergy Home shared the same internal resources through FESC, which were potentially financed by the regulated utilities.[10]

FirstEnergy has agreed (or at least not objected) to separate Suvon, including FirstEnergy Advisors and FirstEnergy Home, from FESC.[11] But to the extent FESC provides shared corporate

[5] FirstEnergy Comments to Daymark Audit Report at 4.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *See* Vistra Comments to Daymark Audit Report at 6-7.
[10] Daymark Audit Report at 69.
[11] FirstEnergy Comments to Daymark Audit Report at 2.

services to any current or future FirstEnergy competitive affiliates, this results in cross-subsidization as explained herein and in Vistra's Comments to the Daymark Audit Report.[12] Such finding is only made more concerning by FirstEnergy declining to set up a process for correcting FESC errors in cost allocation. Further, FESC's provision of shared corporate services provides FirstEnergy's competitive affiliates with an unfair competitive advantage because non-FirstEnergy competitive suppliers, such as Vistra, must bear the costs of such services without the ability to cross-subsidize these services as Daymark found with FirstEnergy's potential financing by the regulated utilities. By avoiding such costs, FirstEnergy competitive affiliates can offer lower rates for electric service, which is critical in a competitive utility market that requires balancing pricing with tight margins. In fact, the lower rates that Daymark found the FirstEnergy competitive affiliates are able to offer is directly the result of funds collected from regulated utility customers, without those regulated utility customers receiving a benefit for their subsidization of the FirstEnergy competitive affiliates.

Accordingly, Vistra recommends that the Commission require that FirstEnergy provide an annual compliance report[13] detailing how it is monitoring their allocated charges and ensuring that no FESC costs of servicing any current or future FirstEnergy competitive affiliates are borne by the regulated utilities.

## V. Conclusion

For the reasons above, the Commission should: (1) acknowledge FirstEnergy's agreement to adopt the majority of the recommendations in the Daymark Audit Report; and (2) following the

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[12] *See* Vistra Comments to Daymark Audit Report at 6-7.

[13] This proposed report would be in addition to and separate from the CAM that provides a thorough understanding of the allocated charges, an accounting of any manual adjustments to allocations that FirstEnergy self-identified as part of its monitoring of allocated charges, and an opportunity for further adjustment of charges if found to be in violation of FirstEnergy's CAM or Ohio law.

evidentiary hearing scheduled in this matter, issue a compliance order pursuant to R.C. 4928.18(C)(1), with the provisions suggested herein. Vistra also incorporates by reference, as if restated herein, its prior Comments to the Daymark Audit Report filed on November 22, 2021.

Respectfully submitted,

*/s/ Kodi Jean Verhalen*

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on December 13, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

*/s/ Kodi Jean Verhalen*
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