

**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.)	

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

Bruce Weston (0016973)
Ohio Consumers' Counsel

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

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: (614) 466-9567 (Willis)
Telephone: (614) 466-9585 (Finnigan)
Maureen.willis@occ.ohio.gov
John.finnigan@occ.ohio.gov
(willing to accept service by e-mail)

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I. INTRODUCTION

The contrast between the FirstEnergy Utilities' comments and the intervenors' comments could not be greater. The FirstEnergy Utilities admit to no violations of Ohio corporate separation law; the intervenors explain how the FirstEnergy Utilities committed major violations. The FirstEnergy Utilities have no concern that the audit excluded H.B. 6; the intervenors explain how this created a problem. The FirstEnergy Utilities do not discuss their H.B. 6 activities in the context of corporate separation; the intervenors demonstrate how FirstEnergy's H.B. 6 activities were a major breach of corporate separation law with H.B. 6. The FirstEnergy Utilities do not admit that any forfeitures are appropriate; the intervenors make a compelling case for major forfeitures. The FirstEnergy Utilities believe they should bear no responsibility for monitoring and resolving errors in charges allocated to them by the service company; the intervenors explain how the utilities should be held accountable for the millions of dollars of misallocated costs, including \$4.3 million of political spending on H.B. 6 that went into the coffers of the former PUCO chair for "performing official action in his capacity as PUCO Chairman to further

FirstEnergy Corp.’s interests relating to the passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”¹

The intervenors’ positions are well-supported by the facts and well-grounded in Ohio law, so the Public Utilities Commission of Ohio (“PUCO”) should reject the FirstEnergy Utilities’ positions and, instead, adopt the intervenors’ recommendations.

II. REPLY COMMENTS

- A. The PUCO should find that FirstEnergy’s corporate separation plan violated R.C. 4928.17(A)(3) and O.A.C. 4901:1-37-07 because it was unauditabile. The PUCO should investigate why the corporate separation compliance records from 2016-2020 are missing, as it seems that the PUCO auditor failed to adequately explain it.**

The initial comments by the Office of the Ohio Consumers’ Counsel (“OCC”) explain how FirstEnergy’s corporate separation plan violated R.C. 4928.17(A)(3) and O.A.C. 4901:1-37-07 because it was unauditabile. The plan was unauditabile because, among other things, the corporate separation compliance records from 2016-2020 are missing. This is a clear violation of FirstEnergy’s responsibility to maintain “sufficient” records to demonstrate compliance with corporate separation requirements. Other commenters also noted this deficiency. The Ohio Manufacturers’ Association Energy Group (“OMAEG”)’s initial comments also discuss how the audit report was insufficient due to FirstEnergy’s failure to produce the corporate separation compliance records from 2016-2020.²

The PUCO should address this failure first by finding that FirstEnergy violated R.C. 4928.17(A)(3) and O.A.C. 4901:1-37-07 due to an unauditabile corporate separation plan.

¹ *U.S. v. FirstEnergy Corp.*, Case No. 1:21-cr-00086-TSB, Deferred Prosecution Agreement at 17 (S.D. Ohio) (July 22, 2021).

² OMAEG Initial Comments at 7 (Nov. 22, 2021).

Second, the PUCO should investigate why the corporate separation compliance records from 2016-2020 are missing, as it seems that the PUCO auditor failed to adequately explain it. The auditor simply stated that the records were missing but provided no additional background information. The PUCO should investigate whether the records were ever kept, who kept the records, who assisted in preparing the records, why the records are unavailable, what efforts FirstEnergy made to search for the records, etc.

FirstEnergy has shown in these investigations a disturbing pattern of concealing information from the PUCO. For example, when the PUCO issued a show-cause order in Case No. 20-1502-EL-UNC requiring FirstEnergy to state whether any H.B. 6 costs were included in consumers' rates, FirstEnergy responded in the negative. The deposition of Mr. Santino Fanelli later revealed that FirstEnergy had booked costs to the FirstEnergy Utilities for contributions to Generation Now and Hardworking Ohioans and that FirstEnergy was aware of this when it submitted its response to the show-cause order. But FirstEnergy decided to conceal this information from the PUCO when it responded to the show-cause order. The audit in Case No. 20-1629-EL-RDR confirmed that these costs were included in consumers' rates.

Further, FirstEnergy did not timely disclose to the PUCO that the \$4.3 million "consulting" payment to Mr. Randazzo's firm was political spending in support of H.B. 6. FirstEnergy knew by February, 2021 that the payment was related to H.B. 6, as seen from its SEC filings that "FirstEnergy believes that payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement."³ FirstEnergy disclosed on April 23, 2021 that it was in talks with the U.S. Attorney about entering into a

³ FirstEnergy Corp. Form 10-K at 125 (Feb. 18, 2021).

Deferred Prosecution Agreement, where FirstEnergy admitted the \$4.3 million payment was political spending in support of H.B. 6.⁴ Yet FirstEnergy did not disclose this fact to the PUCO until August 6, 2021 (when FirstEnergy filed a motion to supplement its response to the show-cause order), after the Deferred Prosecution Agreement became public.

This is important information for, among other things, an adequate PUCO audit and determining the level of forfeitures that should be imposed for FirstEnergy's violation of corporate separation requirements in maintaining an unauditable corporate separation plan.

B. As recommended in a motion by OCC and NOPEC, the PUCO should order a supplemental audit to address the extent to which FirstEnergy's H.B. 6 misconduct violated Ohio corporate separation law.

The initial comments by OCC describe how PUCO Staff told the auditor to exclude FirstEnergy's H.B. 6 misconduct from the scope of the audit.⁵ OCC explained how this was a major problem, and how this violated the PUCO's instructions when the PUCO opened this case.⁶

FirstEnergy does not address this issue in its initial comments, even though OCC has pointed out the problem in prior filings.⁷ Of note, however, is the fact that FirstEnergy did not object to the request for an audit of the political and charitable spending by or on behalf of the utilities related to H.B.6.⁸ Other intervenors agree with OCC's recommendation calling for a

⁴ M. Gillispie, *FirstEnergy in talks on deferred prosecution agreement*, AP News (Apr. 23, 2021).

⁵ OCC Initial Comments at 2-3 (Nov. 22, 2021).

⁶ *Id.*

⁷ *Id.* at 4; *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. Revised Motion for an Independent Auditor at 11 (Oct. 27, 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, FirstEnergy Utilities' Memorandum Contra at 2-4 (Nov. 12, 2021).

supplemental audit. NOPEC cited the Motion for Supplemental Audit⁹ that OCC and NOPEC previously filed.¹⁰ OMAEG explained how “the scope of the audit report is insufficient to protect consumers and is inconsistent with the Commission’s prior directives.”¹¹ OMAEG recommends that “the Commission should formally acknowledge the deficiencies in the Audit Report [and] order a supplemental audit to account for these deficiencies....”¹²

Based on these recommendations, the PUCO should order a supplemental audit as described in more detail in OCC and NOPEC’s Motion for Supplemental Audit.¹³

C. The PUCO should find that the FirstEnergy Utilities committed serious breaches of corporate separation law in spite of FirstEnergy’s attempt to gloss over numerous corporate separation violations identified in the Audit Report.

Even without considering FirstEnergy’s H.B. 6 misconduct, the auditor found that FirstEnergy is compliant with only 23 of the 44 requirements of O.A.C. Chapter 4901:1-37.¹⁴ OCC described how these deficiencies made the plan unauditable and recommended that the PUCO order FirstEnergy to remedy the plan to place it into auditable condition.¹⁵ OCC also described how the plan was “insufficient” in many respects, in violation of R.C. 4928.17(A)(3) and O.A.C. 4901:1-37-07(A).¹⁶ OCC also explained how FirstEnergy’s cost allocation practices violated several corporate separation practices.¹⁷

⁹ Motion for Supplemental Audit (Nov. 5, 2021).

¹⁰ NOPEC Initial Comments at 3 (Nov. 22, 2021).

¹¹ OMAEG Initial Comments at 7-14 (Nov. 22, 2021).

¹² *Id.* at 14.

¹³ Motion for Supplemental Audit (Nov. 5, 2021).

¹⁴ Daymark Audit Report at 7.

¹⁵ OCC Initial Comments at 6-14 (Nov. 22, 2021).

¹⁶ *Id.* at 6-19.

¹⁷ *Id.* at 19-23.

The FirstEnergy Utilities’ comments do not acknowledge any deficiencies. Instead, they describe the audit as merely offering some friendly advice (“Daymark’s Audit Report offers helpful solutions to improve the Companies’ compliance efforts with respect to Ohio corporate separation rules.”¹⁸) The PUCO should reject the FirstEnergy Utilities’ attempt to gloss over the major corporate separation violations it committed. The PUCO should impose major forfeitures commensurate with these major violations.

As stated, FirstEnergy describes the audit report as “helpful solutions”¹⁹ and “constructive feedback”²⁰ and “recommendations regarding improvements.”²¹ FirstEnergy downplays everything and acts as if nothing untoward has occurred. FirstEnergy’s failure to admit fault also occurred after it fired CEO Chuck Jones for his role in the H.B. 6 scandal, which FirstEnergy described as no more than an “inappropriate tone at the top.”²² After a meltdown in corporate separation protection it led to what has been described as “the largest bribery, money-laundering scandal in Ohio history.”²³ With this backdrop, it is remarkable to hear FirstEnergy say their corporate separation practices only need a few “helpful solutions.”

FirstEnergy’s failure to produce the compliance records from 2016-2020²⁴ is a serious corporate separation breach, yet FirstEnergy nowhere acknowledges this in its initial comments.

¹⁸ Initial Comments of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company at 1 (Nov. 22, 2021).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² FirstEnergy Corp., Form 10-Q at 84 (Nov. 19, 2020).

²³ M. Scladen, *Ohio House Speaker, four others arrested amid massive dark-money, pay-to-play allegations*, Ohio Capital Journal (July 21, 2021).

²⁴ OCC Initial Comments at 6-14 (Nov. 22, 2021).

Other intervenors concurred with OCC that FirstEnergy committed serious corporate separation violations even before considering FirstEnergy’s H.B. 6 misconduct. OMAEG noted how Daymark’s finding of no major violations is “inconsistent with the Audit Report itself...and defies logic as a violation of a rule is still a violation.”²⁵ OMAEG highlighted FirstEnergy’s deficiencies in recordkeeping, monitoring and cost allocation.²⁶ Industrial Energy Users-Ohio (“IEU-Ohio”) points out that “the large number of room for improvement (13) and minor noncompliance (8) findings strongly indicate (sic) the Commission needs to take action to improve FirstEnergy’s corporate separation compliance.”²⁷ Direct Energy commented that “[t]he Daymark Report confirms what Sage Consulting reported almost four years ago – that FirstEnergy has not complied with corporate separation rules and statutes.”²⁸ Vistra Energy Corp. (“Vistra”) remarked: “[i]t is apparent from the audit report that FirstEnergy has declined to voluntarily bring its operations and corporate structure, particularly with respect to affiliates, into compliance with such laws and rules.”²⁹

Based on these comments, the PUCO should make findings that the FirstEnergy Utilities committed serious breaches of corporate separation law, even before FirstEnergy’s H.B. 6 misconduct is accounted for.

D. The PUCO should find that the FirstEnergy’s cost allocation practices violated corporate separation requirements and should require the FirstEnergy Utilities to have dedicated staff who can monitor, investigate and challenge service company allocations, along with a well-documented dispute resolution process.

²⁵ OMAEG Initial Comments at 14 (Nov. 22, 2021).

²⁶ *Id.* at 14-22.

²⁷ IEU-Ohio Initial Comments at 2 (Nov. 22, 2021).

²⁸ Direct Energy Initial Comments at 1 (Nov. 22, 2021).

²⁹ Vistra Initial Comments at 1 (Nov. 22, 2021).

The auditor repeatedly criticized FirstEnergy’s cost allocation practices, as OCC discussed in its initial comments.³⁰ The auditor noted: “[w]hile FirstEnergy has maintained a CAM [Cost Allocation Manual], *the CAM lacks enough internal controls* and oversight regarding the use of cost allocators and cost allocated to Ohio Companies to prevent cross-subsidization.”³¹ As OCC noted in its initial comments, FirstEnergy’s lack of internal controls is a resounding theme contained in remarks by the auditor, Standard and Poor’s and FirstEnergy Corp.’s own admissions in press releases and SEC filings.³²

FirstEnergy agreed with most of the auditor’s recommendations regarding its cost allocation practices.³³ FirstEnergy rejected, however, the auditor’s most important recommendation – that the FirstEnergy Utilities take responsibility for monitoring and resolving any cost allocation errors. FirstEnergy rejected the notion “that the Companies should bear responsibility for monitoring and resolving any errors in the charges allocated to them from FirstEnergy Service Company.”³⁴ The FirstEnergy Utilities claim that because they “are not responsible for budgeting or managing their indirect costs or associated activities, nor staffed to perform these duties, they are in no position to monitor them.”³⁵

The PUCO should reject the FirstEnergy’s hands-off approach to the service company charges for a number of reasons. First, the service company charges to the FirstEnergy Utilities are significant. According to FirstEnergy Service Company’s 2018 FERC Form 60, for the year

³⁰ Initial Comments of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company at 3-4 (Nov. 22, 2021).

³¹ Daymark Audit Report at 90.

³² OCC Initial Comments at 11-14 and 19-23 (Nov. 22, 2021).

³³ Initial Comments of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company at 4 (Nov. 22, 2021).

³⁴ *Id.*

³⁵ *Id.*

ending 2018, FirstEnergy Service Company charged the FirstEnergy utility operating companies \$1.12 billion for services provided by the service company.³⁶ To assert that the FirstEnergy utilities are not responsible for managing or monitoring these costs is absurd. If not FirstEnergy Utilities, then who?

Second, FirstEnergy's position is at odds with Ohio utility regulation. The PUCO has responsibility to ensure that the costs of goods and services provided by a centralized service company to a public utility within the holding company system are just, reasonable and not unduly discriminatory or preferential. Only costs that are determined to be just and reasonable may be charged to consumers.³⁷ This creates an obligation on the utility's part to prove that the costs it seeks to charge consumers are just and reasonable. The FirstEnergy utilities cannot just walk away from that responsibility unless they are willing to forego cost recovery of these costs.

Third, FirstEnergy's approach is also inconsistent with the Uniform System of Accounts ("USoA"), which FirstEnergy must follow.³⁸ The USoA provides:

2. Records.

- A. Each utility shall keep its books of account, and all other books, records, and memoranda which support the entries in such books of account so as to be able to furnish readily full information as to any item included in any account. Each entry shall be supported by such detailed information as will permit ready identification, analysis, and verification of all facts relevant thereto.³⁹

If the FirstEnergy Utilities refuse to take responsibility for reviewing and disputing cost

³⁶ FirstEnergy Service Company FERC Form 60 at 301 (2018).

³⁷ R.C. 4905.22.

³⁸ O.A.C. 4901:1-9-05(A).

³⁹ 18 CFR Part 101, *Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, General Instructions (2) Records*.

allocations from FirstEnergy Service Company, then the FirstEnergy Utilities are unable to keep their own book of accounts. The requirement to keep a book of accounts includes having full information to support all entries. If the FirstEnergy Utilities have no capability to review and dispute cost allocations from FirstEnergy Service Company, then the FirstEnergy Utilities have abdicated their responsibility for keeping their own book of accounts. FirstEnergy's position is unacceptable.

The other intervenors also described FirstEnergy's cost allocation practices as significant corporate separation violations. OMAEG said: "[t]his is a flagrant violation of Ohio's corporate separation requirements, which expressly prohibit this sort of cross-subsidization."⁴⁰ IEU-Ohio pointed out the auditor's requirement that the cost allocation manual was not sufficient to prevent cross-subsidization.⁴¹ Vistra noted that a particular concern was "the lack of internal controls and oversight regarding cost allocation of shared corporate service charges."⁴²

The PUCO should reject the FirstEnergy Utilities' position that they should not be required to monitor and challenge improper cost allocations. The PUCO should find that the cost allocation practices described by the auditor violate Ohio's corporate separation requirements. The PUCO must reject FirstEnergy's position that the FirstEnergy Utilities do not need to have the capability to monitor, detect and challenge cost allocations from FirstEnergy Service Company, along with a well-documented dispute resolution process.

E. FirstEnergy's H.B. 6-related activities also violated Ohio corporate separation law.

⁴⁰ OMAEG Initial Comments at 16 (Nov. 22, 2021).

⁴¹ IEU-Ohio Initial Comments at 5 (Nov. 22, 2021).

⁴² Vistra Initial Comments at 11 (Nov. 22, 2021).

FirstEnergy violated corporate separation law when it committed “the largest bribery, money-laundering scheme ever perpetrated against the people of the state of Ohio.”⁴³ The PUCO should issue a ruling that FirstEnergy’s H.B. 6 misconduct violated Ohio corporate separation laws and rules, as described in OCC’s initial comments.

The other intervenors agreed that FirstEnergy’s H.B. 6 misconduct also violated corporate separation requirements. NOPEC described “how its involvement with the HB 6 scandals and, separately, with former Chair Randazzo” affected FirstEnergy Advisors’ application for certification as a governmental aggregator.⁴⁴ OMAEG remarked that FirstEnergy’s H.B. 6 misconduct “is a flagrant violation of Ohio’s corporate separation requirements, which expressly prohibit this sort of cross-subsidization.”⁴⁵ IGS Energy explained that the DCR audit report showed that, by booking the payments to Sustainability Funding Alliance, the FirstEnergy Utilities were improperly cross-subsidizing their competitive affiliate for several years.⁴⁶

FirstEnergy’s H.B. 6 misconduct clearly violated Ohio cost allocation rules because FirstEnergy booked substantial H.B. 6 costs to the FirstEnergy Utilities. The PUCO should make a finding that FirstEnergy’s H.B. 6 misconduct violated Ohio corporate separation requirements.

F. The PUCO should find that FirstEnergy violated corporate separation requirements regarding the PUCO’s approval of FirstEnergy Advisors and in FirstEnergy Advisors’ use of common management and the FirstEnergy name and logo.

⁴³ L. Bischoff, J. Sweigart & L. Hulsey, *Here’s how feds say largest bribery scheme in Ohio was perpetrated*, Dayton Daily News (July 22, 2020).

⁴⁴ NOPEC Comments at 1 (Nov. 22, 2020).

⁴⁵ OMAEG Comments at 16 (Nov. 22, 2020).

⁴⁶ IGS Energy Comments at 10 (Nov. 22, 2021).

OCC’s initial comments explain how FirstEnergy violated corporate separation law by allowing FirstEnergy Advisors to use the FirstEnergy name and logo and by using a shared senior executive to manage competitive products and services offered by the utility and by FirstEnergy Advisors.⁴⁷ FirstEnergy’s comments did not acknowledge any corporate separation violations relating to FirstEnergy Advisors.

The other intervenors explained in great detail how FirstEnergy’s operation of FirstEnergy Advisors violated corporate separation requirements. NOPEC pointed to emails showing that FirstEnergy Advisors improperly colluded with the FirstEnergy Utilities and the former PUCO Chair to obtain PUCO certification as a competitive retail electric service provider.⁴⁸ According to NOPEC, the emails show how the former PUCO Chair “fixed” the outcome of FirstEnergy Advisors’ application, in a “blatant abuse of market power.”⁴⁹ NOPEC also showed how FirstEnergy violated corporate separation requirements through the use of common branding and a shared senior executive for nonregulated offerings by the FirstEnergy Utilities and FirstEnergy Advisors.⁵⁰

OMAEG commented that the Chuck Jones/Dennis Chack emails prove that “FirstEnergy Corp. used its regulated utilities to gain a competitive advantage in violation of Ohio’s corporate separation laws.”⁵¹ OMAEG also explained how FirstEnergy is violating corporate separation requirements by using utility resources to offer competitive products and services from

⁴⁷ OCC Comments at 24-28 (Nov. 22, 2021).

⁴⁸ NOPEC Comments at 1-2 (Nov. 22, 2021).

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 7-19.

⁵¹ OMAEG Comments at 18 (Nov. 21, 2021).

FirstEnergy Products and FirstEnergy Home.⁵² The other intervenors also explained how FirstEnergy violated corporate separation requirements in how it obtained PUCO approval for FirstEnergy Advisors and how it offered competitive services.⁵³

The PUCO should issue findings that FirstEnergy violated corporate separation requirements as to how it obtained approval and operated FirstEnergy Advisors and how it offers competitive products and services from FirstEnergy Products and FirstEnergy Home.

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

The FirstEnergy Utilities don’t admit to any corporate separation violations. They don’t acknowledge that any fine is appropriate for corporate separation violations. The FirstEnergy Utilities manage to take this position even though FirstEnergy Corp. admitted to the underlying facts of honest services wire fraud and agreed to a \$230 million fine. On the other hand, FirstEnergy Corp. admitted in the Deferred Prosecution Agreement that it “paid millions of dollars to Public Official A through his 501(c)(4), Generation Now, in return for Public Official A pursuing nuclear legislation for FirstEnergy Corp.’s benefit in his capacity as a public official.”⁵⁴ FirstEnergy Corp. also admitted in the Deferred Prosecution Agreement that it “paid \$4.3 million dollars to Public Official B through his consulting firm in return for Public Official B performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s

⁵² *Id.* at 18-19.

⁵³ Comments of Interstate Gas Supply, Inc. at 12-38 (Nov. 22, 2021); Comments of Vistra at 3-11 (Nov. 22, 2021); Comments of IEU-Ohio at 2-4 (Nov. 22, 2021).

⁵⁴ *U.S. v. FirstEnergy Corp.*, Case No. 1:21-cr-00086-TSB, Deferred Prosecution Agreement at 17 (S.D. Ohio) (July 22, 2021).

interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”⁵⁵

OCC explains how these violations should result in significant forfeitures. The violations reveal an insufficient corporate separation plan due to a failure to keep records, a failure to provide training, a failure to do compliance monitoring, a failure to address Ohio-specific corporate separation requirements, failure to monitor cost allocations, and corporate separation violations related to H.B. 6 misconduct and competitive service offerings. Preliminarily, OCC has identified the need for FirstEnergy to pay forfeitures in the range of \$55.4 million to \$110.9 million.⁵⁶ OCC expects its forfeitures figure (for FirstEnergy to pay) will increase as the investigation progresses with more information. OMAEG argued for forfeitures of \$766.5 million.⁵⁷ The other intervenors did not recommend any specific amount of forfeitures, but called for forfeitures, nonetheless.

H. The PUCO should grant the additional consumer protection remedies proposed by OCC and the other intervenors.

Along with its joint motion with NOPEC for a supplemental audit,⁵⁸ OCC’s initial comments proposed the following remedies in addition to recommended forfeitures:⁵⁹

- 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

⁵⁵ *Id.*

⁵⁶ OCC Comments at 28-33 (Nov. 22, 2021).

⁵⁷ Comments of OMAEG at 24 (Nov. 22, 2021).

⁵⁸ Motion for Supplemental Audit (Nov. 5, 2021).

⁵⁹ OCC Initial Comments at 38-39 (Nov. 22, 2021).

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 similarly situated FirstEnergy affiliate or subsidiary).
- 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.

Several commenters agreed with OCC's recommendation that the PUCO should require FirstEnergy to file a new corporate separation plan, along with improved cost allocation practices.⁶⁰ OMAEG concurred with the recommendation of a supplemental audit report.⁶¹ OMAEG proposed an adverse inference instruction that the missing information should be construed against FirstEnergy.⁶² OMAEG also recommended annual corporate separation audits, with the audit findings publicly available.⁶³

Commenters offered many additional recommendations regarding FirstEnergy's competitive services offerings. NOPEC proposed a five-year ban of FirstEnergy Utilities or any of its competitive affiliates from offering competitive services in Ohio.⁶⁴ Vistra recommended

⁶⁰ OMAEG Initial Comments at 24-25 (Nov. 22, 2021); Vistra Initial Comments at 2 (Nov. 22, 2021); IGS Energy Initial Comments at 12 (Nov. 22, 2021).

⁶¹ OMAEG Initial Comments at 14 (Nov. 22, 2021).

⁶² *Id.* at 21-22.

⁶³ *Id.* at 23.

⁶⁴ NOPEC Initial Comments at 21-22 (Nov. 22, 2021).

that FirstEnergy Advisors be put into a separate organization and that it not receive services from FirstEnergy Service Company.⁶⁵ Vistra and IGS Energy both recommended that FirstEnergy Products not be permitted to use the FirstEnergy name or logo.⁶⁶ IGS Energy asked the PUCO to further investigate how the FirstEnergy Utilities might be subsidizing FirstEnergy's competitive service offerings.⁶⁷ IEU-Ohio recommended that FirstEnergy's competitive service offerings should be structurally separated from the FirstEnergy Utilities.⁶⁸

OCC requests that the PUCO adopt its recommendations for other relief in addition to the supplemental audit and forfeitures. The other intervenors' additional recommendations largely appear to be reasonable and OCC recommends that the PUCO give them due consideration.

I. Procedure

Direct Energy laid out a well-considered approach for procedural next steps. Direct Energy's main point is that this case is currently an investigative proceeding under R.C. Chapter 4903 and the PUCO should convert it to an enforcement proceeding under R.C. Chapter 4926.⁶⁹ Direct Energy suggests that the PUCO can accomplish this by using the Daymark and Sage audit reports as the basis for a show-cause order requiring FirstEnergy to demonstrate why it should not be found in violation of R.C. 4928.17 and O.A.C. Chapter 4901:1-37.⁷⁰ Direct Energy further suggests that the currently scheduled hearing date of February 10, 2022 could be used for a hearing on the show-cause order.⁷¹

⁶⁵ Vistra Initial Comments at 2 (Nov. 22, 2021).

⁶⁶ *Id.*; IGS Energy Initial Comments at 30 (Nov. 22, 2021).

⁶⁷ IGS Energy Initial Comments at 26-30 (Nov. 22, 2021).

⁶⁸ IEU-Ohio Initial Comments at e (Nov. 22, 2021).

⁶⁹ Direct Energy Initial Comments at 2 (Nov. 22, 2021).

⁷⁰ *Id.*

⁷¹ *Id.*

OCC generally supports Direct Energy's recommended approach. However, the show-cause order and hearing should not occur until after the supplemental audit report is available and other relevant events have been resolved. And there should be an opportunity for further case preparation including discovery. The supplemental audit report should assess whether FirstEnergy's H.B. 6 misconduct violated Ohio corporate separation requirements.

The PUCO should vacate its current procedural schedule, which calls for intervenors to file testimony by January 17, 2022 and a hearing to begin on February 10, 2022.⁷² OCC and NOPEC filed a joint motion to extend these deadlines, and this motion is unopposed.⁷³ The rationale for the joint motion is that the PUCO should order a supplemental audit and the testimony and hearing deadlines should be extended until after the supplemental audit report is filed.⁷⁴

Another reason for extending these deadlines is FirstEnergy's delay in providing discovery to the parties. On September 24, 2021, OCC filed a motion for subpoena to obtain all the documents that FirstEnergy Corp. produced to the DOJ and SEC.⁷⁵ FirstEnergy provided over 15,000 pages of information to the parties on November 12, 2021. FirstEnergy provided over 56,000 pages of additional information on December 8, 2021. FirstEnergy has not indicated whether this is the final production or whether additional documents will be forthcoming. OCC needs additional time to analyze these documents and, if needed, to conduct additional follow-up discovery, before it can file testimony or prepare for hearing.

⁷² Entry at ¶ 24 (Oct. 12, 2021).

⁷³ Motion for Supplemental Audit, Motion to Extend Deadlines for Comments, Reply Comments and Hearing-Related Matters, Request for Expedited Ruling (Nov. 5, 2021).

⁷⁴ *Id.*

⁷⁵ Motion for Subpoena (Sept. 24, 2021).

Another reason to continue the hearing is that the PUCO should not hold the hearing until after the criminal investigation is completed. If the hearing is held before the criminal investigation is complete, the hearing could interfere with the criminal investigation. Moreover, witnesses might refuse to testify at the PUCO hearing on the ground of self-incrimination. Finally, the criminal investigation may continue to unearth facts relevant to this case. OCC notes that FirstEnergy reports that it is defending eighteen civil lawsuits arising from the company's bribery and money laundering scheme.⁷⁶ A deposition schedule in one of the securities fraud class action cases provides for depositions of the key witnesses to occur in March and April 2021.⁷⁷

The PUCO should extend the deadlines for testimony and continue the hearing in the present case until OCC and the other parties have adequate time to review the documents that FirstEnergy is supplying and to glean any relevant information that may be produced in the criminal and civil investigations of FirstEnergy's bribery and money laundering scheme.

III. CONCLUSION

OCC and the other intervenors presented substantial evidence that FirstEnergy consumers were charged (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). The PUCO should order the supplemental audit as jointly requested by OCC and NOPEC. For the reasons stated above, the investigation should continue with future opportunities for presenting final recommendations to the PUCO for sufficient FirstEnergy corporate separation. That

⁷⁶ FirstEnergy Corp. Form 10-K at 124-125 (Feb. 18, 2021).

⁷⁷ *Miller v. Anderson*, Case No. 5:20-CV-01743, Deposition Schedule (Dec. 3, 2021).

should include forfeitures and other remedies including the \$20 million in FirstEnergy-funded financial assistance that OCC proposed for at-risk FirstEnergy consumers.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

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

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: (614) 466-9567 (Willis)
Telephone: (614) 466-9585 (Finnigan)
Maureen.willis@occ.ohio.gov
John.finnigan@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply Comments served upon the persons listed below by electronic transmission this 13th day of December 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:

SERVICE LIST

thomas.lindgren@ohioAGO.gov
werner.margard@ohioAGO.gov
joliker@igsenergy.com
Mnugent@igsenergy.com
bethany.allen@igs.com
evan.betterton@igs.com
gkrassen@bricker.com
dstinson@bricker.com
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com
mfleisher@dickinsonwright.com
mwise@mcdonaldhopkins.com
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com

bknipe@firstenergycorp.com
mrgladman@jonesday.com
mdengler@jonesday.com
radoringo@jonesday.com
mwager@taftlaw.com
iavalon@taftlaw.com
mpritchard@mcneeslaw.com
tlong@mcneeslaw.com
rdove@keglerbrown.com
bojko@carpenterlipps.com
donadio@carpenterlipps.com
mleppla@theOEC.org
tdougherty@theOEC.org
ctavenor@theOEC.org

Attorney Examiner:

Gregory.price@puco.ohio.gov
Megan.addison@puco.ohio.gov
Jacqueline.st.john.puco.ohio.gov

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Summary: Comments Reply Comments Protecting Consumers from Improper
Charges under FirstEnergy's "Corporate Separation" by Office of The Ohio
Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Willis,
Maureen R.