BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37.	**))))))**	**Case No. 17-0974-EL-UNC**

REPLY COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") appreciate the comments [1] provided by Intervenors [2] regarding the September 13, 2021 Audit Report submitted by Daymark Energy Advisors ("Daymark") with respect to the Companies' compliance with the Commission's corporate separation rules ("Audit Report").[3] The Companies agree with Daymark and the Intervenors that the Companies should accept recommendations in the Audit Report to improve their monitoring, training, and accounting processes. In response to the ongoing investigations, the Companies',

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[1] Initial Comments on Protecting Consumers from Improper Charges Under FirstEnergy's "Corporate Separation" by the Office of the Ohio Consumers' Counsel (Nov. 22, 2021) ("OCC Comments at __."); Comments of the Ohio Manufacturers' Association Energy Group (Nov. 22, 2021) ("OMAEG Comments at __."); Initial Comments of Vistra Energy Corp. (Nov. 22, 2021) ("Vistra Comments at __."); Comments of Northeast Ohio Public Energy Council's Comments to Daymark Energy Advisors' Audit Report (Nov. 22, 2021) ("NOPEC Comments at __."); Initial Comments of Direct Energy Business, LLC and Direct Energy Services, LLC Regarding Daymark Energy Advisors' Compliance Audit (Nov. 22, 2021) ("Direct Energy Comments at __."); Initial Comments of Industrial Energy Users-Ohio (Nov. 22, 2021) ("IEU-Ohio Comments at __."); Third Set of Initial Comments of Interstate Gas Supply, Inc. (Nov. 22, 2021) ("IGS Comments at __.").

[2] The Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Manufacturers' Association Energy Group ("OMAEG"), the Vistra Energy Corp. ("Vistra"), Northeast Ohio Public Energy Council ("NOPEC"), Direct Energy Business, LLC and Direct Energy Services, LLC ("Direct"), Industrial Energy Users-Ohio ("IEU-Ohio"), Interstate Gas Supply, Inc. ("IGS", with OCC, OMAEG, Vistra, NOPEC, Direct, and IEU-Ohio, the "Intervenors").

[3] A Compliance Audit for the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio (Sept. 13, 2021) (the "Audit Report"). Citations to the Audit Report are identified as "Audit Report at __."

and their parent FirstEnergy's, leadership have modified processes to advance their commitment to transparency and integrity in several ways, such as enhancing incident reporting and investigating, improving programs to support disclosures of corporate political activity and relationships with certain trade associations, and updating the Corporate Political Activity Policy.

Indeed, the Companies and FirstEnergy Corp. are already working to implement many of the recommendations proposed by Daymark and the Intervenors, including recommendations to update the Cost Allocation Manual ("CAM") and amend the Companies' corporate separation plan. Amending the corporate separation plan will result in the Companies discontinuing offering non-electric products and services in Ohio, a legacy activity which the Companies' Commission-approved corporate separation plan permitted to continue. While Intervenor demands for the Companies to prepare, file, and implement their amended corporate separation plan before February 2022 are impractical, given the time and resources needed to implement updates in a comprehensive and meaningful manner, the Companies agree with the need to take this important step. Accordingly, many of the Intervenors' recommendations are already being implemented.[4]

While there is much common ground between the parties, the Companies do respectfully object to certain Intervenor proposals, some of which are far afield from anything addressed in the Audit Report or authorized by well-settled law. Accordingly, the Companies reply below on four key issues.

First, the Companies remain committed to updating their plan, executing Daymark's recommendations, and incorporating appropriate comments from Intervenors.

Second, the imposition of forfeitures, much less the excessive forfeitures that Intervenors recommend, is unwarranted and unconstitutional. While Intervenor forfeiture calculations assume

[4] *See infra*, at Section II.A.

thousands of violations, the auditor identified eight areas of "minor non-compliance." The tens, and even hundreds, of millions of dollars in forfeitures sought by some Intervenors are not authorized by R.C. 4928.18. More fundamentally, the Eighth Amendment's Excessive Fines Clause patently prohibits such disproportional penalties.

Third, an evidentiary hearing in this audit proceeding is unnecessary, since there is no matter for any party to prove. The Commission directed Staff to engage an auditor to review whether the Companies were in compliance with R.C. 4928.17 and the Commission's corporate separation rules. This audit process neither contemplates nor requires an evidentiary hearing. And Intervenor calls to convert this matter into a "show cause" proceeding are similarly misplaced.

Fourth, the Commission should reject the Intervenors' demands to open an expansive audit—not of the Companies'—but of their parent FirstEnergy Corp.'s, privileged internal investigation and conduct in connection with H.B. 6. As the Companies have elsewhere explained, such requests urge the Commission to exceed its statutory authority. Nor does political spending by the Companies' affiliates by itself raise a corporate separation issue under Ohio law. Moreover, to the extent the Intervenors' requests seek to address political and charitable spending charged to customers, questions regarding spending associated with House Bill 6 are already being explored in other proceedings.

II. REPLY TO INTERVENOR COMMENTS

A. The Companies Are Committed To Building A More Robust Compliance Program And Are Amending Their Corporate Separation Plan.

As outlined in their Initial Comments, the Companies are committed to building a more robust and effective compliance plan. Consistent with the Audit Report, the Companies will implement all of the following measures to address the auditor's recommendations:[5]

- Build a robust and effective compliance plan to address gaps between Ohio corporate separation compliance requirements and FERC compliance requirements;
- Develop a proactive compliance monitoring and tracking system with clear identified owners for all activities surrounding the compliance plan;
- Develop a specific training curriculum focused on the Ohio corporate separation plan, including training for all employees over the Cost Allocation Manual ("CAM"), the charging of time and expenses, and customer communications;
- Bolster IT and physical structural safeguards;
- Monitor and track cross-functional work groups;
- Update the CAM, at least annually, to include all information required by O.A.C. 4901:1-37-08(D);
- Establish a succession plan for Compliance Officers;
- Implement more robust internal and external cost allocation auditing processes;
- Implement mechanisms to monitor, track, and report customer complaints regarding CRES providers; and
- Perform an annual internal audit to ensure that adequate protections are in place to prevent cross-subsidization.

Beyond these measures, FirstEnergy Corp. has recently implemented several compliance-focused initiatives across the corporate family. These include increased communication and

[5] *See generally*, Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (Nov. 22, 2021) ("Initial Comments at __.")

training of employees with respect to compliance requirements, and the establishment of a subcommittee of the audit committee of FirstEnergy Corp.'s Board of Directors that assesses the compliance program, provides recommendations, and oversees the implementation of changes to the program. In addition to FirstEnergy Corp.'s appointment of a new Chief Ethics and Compliance Officer to oversee enhancements to enterprise-wide compliance programs and structure, the Companies have also appointed a new Compliance Officer for corporate separation purposes.[6] *See also* FirstEnergy Corp. September 30, 2021 Form 10-Q ("Management and the FE Board take FirstEnergy's internal control[s] . . . and the integrity of its financial statements seriously [and have] . . . completed the documentation and testing of the remedial actions [such that] . . . the previously disclosed material weakness has been remediated.").[7]

As part of their parent company's holistic approach to compliance improvements, the Companies will also file an amended corporate separation plan. To be sure, the Companies strongly disagree with the exaggerated attacks against the current Plan offered by some Intervenors. Direct Energy contends, for example, that the Companies' Plan "has been inadequate and insufficient from day 1."[8] But that Plan, originally filed in Case No. 09-462-EL-UNC, was approved by the Commission in the Companies' ESP II case.[9] The Companies' Plan was then

[6] Case No. 09-0462-EL-UNC, Letter of Notification (Sept. 22, 2021).

[7] These measures, among others, have been publicly recognized as significant steps taken by FirstEnergy Corp. to remediate internal controls issues. *See* FirstEnergy addresses equity needs, boosts balance sheet with transmission sale (Nov. 8, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/firstenergy-addresses-equity-needs-boosts-balance-sheet-with-transmission-sale-67510892 ("FirstEnergy has made constructive progress in addressing the corporate governance issues related to the investigation, including the various regulatory proceedings that have followed in Ohio.").

[8] Direct Energy at 8.

[9] *See generally* Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010).

approved again in subsequent ESP cases, most recently in 2016.[10] In short, the Companies have for years been operating under a Commission-approved Plan.

Still, the Companies, consistent with FirstEnergy Corp.'s commitment to a best-in-class compliance program, have evaluated the need to update the corporate separation plan approved in 2016 and are working diligently to draft an amended plan. The amended plan will reflect FirstEnergy Corp.'s current corporate structure, and will not seek to continue the Companies' legacy offering of non-electric products and services to their customers. These measures will resolve many of the issues raised by Intervenor comments.[11]

The Companies do have concerns, however, about Intervenors' other proposals with respect to the timing of an amended corporate separation plan.[12] OCC and OMAEG, for instance, argue that the Companies should file a "complete overhaul"[13] of their corporate separation plan "within three months."[14] Direct Energy similarly urges the Commission to have the parties litigate

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[10] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230, Entry (Apr. 25, 2012) (subsequently affirmed by the Ohio Supreme Court in Case No. 2013-0513); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion & Order, (Mar. 31, 2016).

[11] *See, e.g.*, IEU-Ohio at 3; IGS at 4, 13-17; Direct at 9; Vistra at 2, 6-8. The Companies do, however, object to the extent Intervenors are calling for the Commission to require separate legal counsel for each of FirstEnergy Corp.'s regulated utility affiliates for all purposes. *See* NOPEC at 23. Questions concerning the legal representation of clients within the same corporate family are not matters subject to Commission regulation—they are questions answered by the rules of professional conduct and the Ohio Supreme Court within its sole discretion. *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 36 (citing *State ex rel. Buck v. Maloney*, 102 Ohio St.3d 250, 2004-Ohio-2590, 809 N.E.2d 20).

[12] As the Intervenors' voluminous comments go well beyond the directives of this proceeding, the Companies have not addressed each and every recommendation. However, silence on the part of the Companies as to the Intervenors' recommendations should not be interpreted as agreement.

[13] OMAEG Comments at 6, 20, 23.

[14] OCC Comments at 33.

the revised plan at the hearing currently scheduled for February 10, 2022.[15] Given the magnitude and complexity of the undertaking, the Companies are unable to finalize an amended corporate separation plan within the aggressive timeframes some Intervenors propose. The Companies are working to prepare and file an amended corporate separation plan for the Commission's consideration. But it will take time to identify and address the necessary improvements to achieve best-in-class compliance in this area. Filing an amended plan in three months' time is impractical.

OCC's calls for an "independent monitor and an independent oversight committee to oversee [the Companies'] implementation of [their amended] corporate separation plan" should also be rejected.[16] First, OCC's suggestion is devoid of legal support. OCC relies only on R.C. 4928.18(C)'s provision permitting the Commission to "issue an order directing the utility or affiliate to comply" upon determination of a violation pursuant to section (B) of R.C. 4928.18. But none of the remedies permitted by R.C. 4928.18 allow for the institution of an "independent monitor" or "independent oversight committee," nor has the Commission made a "determination of violation" pursuant to R.C. 4928.18(B). Beyond this, the Companies' amended corporate separation plan will, of course, require the Commission's consideration and approval, and the Companies' plan and compliance with Ohio corporate separation law will remain subject to Commission's jurisdiction. Indeed, the Commission has demonstrated its commitment to monitoring and enforcement by directing audits of all Ohio electric distribution utilities in 2014.[17] An "independent monitor" is therefore neither legally justified nor practically necessary.

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[15] Direct Energy Comments at 10.

[16] OCC Comments at 33.

[17] Finding and Order, *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI (Mar. 26, 2014) at ¶¶ 15-16.

B. The Imposition Of Punitive Fines And Penalties Are Unwarranted And Unconstitutional.

Intervenors demand that the Commission impose substantial forfeitures "to deter FirstEnergy and other utilities" from "severe and continuous corporate separation violations."[18] Not only are forfeitures and penalties not warranted here, but the imposition of such excessive fines is also at odds with Ohio law and squarely unconstitutional.

1. There Has Been No "Determination Of A Violation" Pursuant To R.C. 4928.18(B).

As an initial matter, forfeitures may only be imposed upon a determination by the Commission that the Companies violated Ohio corporate separation law. Under R.C. 4928.18, the Commission *may* "commensurate with the severity of the violation, the source of the violation, any pattern of violations, or any monetary damages caused by the violation . . . [i]mpose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation." R.C. 4928.18 (D)(1).

At this juncture, any forfeitures imposed would be procedurally improper. The remedies permitted by R.C. 4928.18(C) and (D), including forfeitures, are triggered only upon "determination of a violation" of R.C. "4928.17 or an order issued or rule adopted under that section." R.C. 4928.18(B). Further, Title XLIX of the Ohio Revised Code meaningfully distinguishes between the imposition of forfeitures for findings of "violations" versus "noncompliance." Unlike R.C. 4905.95, which allows for forfeitures for a "violation or noncompliance," noncompliance under 4928.18 is not enough.[19] The term "noncompliance" in R.C. 4905.95 cannot be read out of the statute and thus it is material that R.C. 4928.18 imposes

[18] OCC Comments at 5; IGS Comments, at 26.

[19] *See One Bratenahl Place Condo. Assn., Inc. v. Sliwinski*, 2015-Ohio-3353, ¶ 11, 37 N.E.3d 213, 217 ("Statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous . . . .") (quotation omitted).

forfeitures only for "violation[s]." Moreover, R.C. 4905.56, which discusses "[v]iolations," requires that a public utility "knowingly" violate certain statutes or "willfully fail to comply with any lawful order or direction." Nowhere has the auditor, nor the Commission, found "violations" of R.C. 4928.17 or of O.A.C. 4901:1-37, let alone knowing violations. Nor did the auditor find willful unlawful conduct on behalf of the Companies. Of the 44 areas Daymark assessed, it "did not find major non-compliance with the requirements."[20] Instead, Daymark noted only 8 areas where "minor non-compliance" existed.[21] And, critically, R.C. 4928.18(B) applies only to enforcement proceedings under R.C. 4905.26. Simply put, there has been no process taken under Ohio statute here that would permit the imposition of forfeitures against the Companies.

Despite all this, at least one Intervenor improperly terms every single "opportunity for improvement" or finding of "minor non-compliance" a "violation" under R.C. 4928.18. Intervenors demand excessive forfeitures, ranging from, for example, $55,475,000 to $110,950,000, according to OCC,[22] to "at a minimum" $766.5 million, according to OMAEG.[23] These excessive forfeitures are not permitted by R.C. 4928.18; the auditor's findings of minor non-compliance or recommendations for improvement are plainly not enough under the statute's unambiguous language that applies only to "violations."

[20] Audit Report at 7.

[21] Audit Report at 7.

[22] OCC Comments at 30.

[23] OMAEG Comments at 24. To the extent Intervenors seek forfeitures for conduct other than what is addressed in the corporate separation audit report, that conduct is being addressed in other regulatory proceedings. For example, OCC seeks forfeitures in connection with misallocated payments to Generation Now and Hardworking Ohioans. Those payments are outside the scope of the Audit Report. Further in Case No. 20-1629-EL-RDR, the auditor determined that payments to Generation Now and Hardworking Ohioans had no impact on the rates paid by the Companies' customers. Additionally, forfeitures are not appropriate here for the other reasons explained herein.

2. Maximum Penalties Are Unsupported Here.

Even if forfeitures could be imposed on this record (and they cannot),[24] the Commission is not *required* to issue forfeitures, much less the *maximum* amount permitted by R.C. 4928.18(D)(1). Forfeitures are typically imposed for intentional bad acts or repeat offenders.[25] Here, the audit report identifies no intentional bad acts. Outside the corporate separation context, the Companies and their parent have already made significant efforts to address instances of non-compliance and prevent similar conduct in the future. In connection with corporate separation, the Companies are modifying internal compliance practices and procedures, implementing auditor recommendations, and proactively addressing many Intervenor concerns. *See supra*, at Section II.A. Moreover, the Companies have fully cooperated with the auditor's review. Contrary to Intervenors' assertions that the Companies "impede[d] a meaningful investigation,"[26] the Companies fully responded to over a thousand data and discovery requests, including subparts, facilitated all interviews requested by the auditor, and answered nearly a dozen sets of Intervenor discovery requests directed at corporate separation issues. The Companies have worked in good faith with Staff, the auditor, and the parties. This is not an instance where a forfeiture—let alone one of such magnitude—is necessary to deter future violations. In sum, the Intervenors' excessive forfeiture demands are

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[24] Nor is an evidentiary hearing on this point necessary given that both the record as to Daymark's findings and Ohio forfeiture law are clear. *See also*, Section II.C.

[25] *See, e.g.*, *In the Matter of the Investigation of Columbia Gas of Ohio, Inc. Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 19-452-GA-GPS, Finding and Order, ¶ 9 (February 27, 2019) (ordering forfeiture for repeated failures); *In the Matter of the Investigation of Columbia Gas of Ohio, Inc. Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 20-1759-GA-GPS, Finding and Order, ¶ 12 (February 24, 2021) (ordering forfeiture where Staff found a "pattern" of over-pressurization events and previously identified Columbia Gas's deficiencies in compliance); *In the Matter of the Investigation of Columbia Gas of Ohio, Inc. Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 21-322-GA-GPS, Opinion and Order, ¶ 14 (September 8, 2021) (imposing forfeiture and noting that "the incident at hand bears similarity" to an over-pressurization event that occurred the year prior).

[26] OMAEG Comments at 21.

divorced from the law, the Audit Report's findings and recommendations, and sound policy. There is no basis for imposing penalties, much less the excessive forfeitures the Intervenors here seek.

3. Excessive Forfeitures Are Unconstitutional.

The forfeitures suggested by the Intervenors would also violate the Excessive Fines Clause of the Eighth Amendment of the United States Constitution and the Ohio Constitution's equivalent. The Eighth Amendment prohibits the imposition of "excessive fines," U.S. Const. amend. VII,[27] and applies to civil forfeiture actions—exactly what is at stake here. *See Austin v. United States*, 509 U.S. 602, 608, 113 S. Ct. 2801, 2804 (1993). When forfeitures move beyond a remedial purpose to a punitive one, they are "subject to the limitations of the Excessive Fines Clause." *Austin*, 509 U.S. at 610. Ohio law treats forfeitures similarly. Ohio Const. Art. 1, Section 9.[28] Here, there is no question that the forfeitures sought by Intervenors are intended to punish the Companies—OCC, IGS, and OMAEG all say so.[29]

Thus, based on the limitations of the Excessive Fines Clause, any forfeitures imposed on the Companies in this proceeding would be "excessive" fines within the meaning of United States and Ohio constitutional law as they are "grossly disproportional to the gravity" of the violation. *United States v. Bajakajian*, 524 U.S. at 334; *see also State v. McShepard*, 2007-Ohio-6006, ¶ 16

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[27] The Excessive Fines Clause of the Eighth Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and thus is applicable to the states. *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019).

[28] "[T]he question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *State v. McShepard*, 2007-Ohio-6006, ¶ 16. Further, under Ohio law, "forfeitures are not favored in law or in equity . . . [and] will be strictly construed. *Rice v. Logan Cty. Bd. of Commrs.*, 114 Ohio App. 3d 198, 203, 682 N.E.2d 1106, 1109 (1996) (citing *State v. Lilliock* (1982), 70 Ohio St.2d 23, 25, 24 O.O.3d 64, 65, 434 N.E.2d 723, 724–725). As a result, forfeiture of property that functions as a "punishment for a specified offense" "constitutes a fine for purposes of Section 9, Article I of the Ohio Constitution and the Eighth Amendment to the United States Constitution." *Id*.

[29] OCC Comments at 31 (discussing the need for penalities); IGS Comments at 26 (discussing need for forfeitures to adequately and fairly penalize FirstEnergy); OMAEG Comments at 23-24 (discussing the need for a large, deterrent forfeiture in the amount "at minimum" of $766.5 million). "Deterrence, however, has traditionally been viewed as a goal of punishment," *United States v. Bajakajian,* 524 U.S. 321, 329 (1998), and forfeitures that serve to "penalize" fall within the limits of the Excessive Fines Clause, *id*. at 331-334.

(applying a proportionality test to determine whether fines comport with the Ohio Constitution). Relevant considerations in this analysis include: whether the forfeiture serves "no remedial purpose" and is "clearly punishment," *Bajakajian*, 524 U.S. at 343-44; "the degree of the defendant's reprehensibility or culpability;" "the relationship between the penalty and the harm" caused by the violations; and "the sanctions imposed in other cases for comparable misconduct," *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 425 (2001).

Here, to the extent Intervenors seek forfeitures for what is addressed in the corporate separation audit, the amounts suggested by the Intervenors—including "at minimum" $766.5 million—are grossly disproportional to the "areas for improvement" and eight instances of "minor non-compliance" found by Daymark, and serve no remedial purpose.[30] S*ee supra*, at Sections II.A, II.B.1. The forfeitures sought by the Intervenors are unconstitutional on their face.[31]

C. An Evidentiary Hearing Is Unnecessary.

The Companies agree with Direct Energy insofar as it argues that an evidentiary hearing on the Audit Report in this proceeding would be inappropriate. This audit proceeding was opened pursuant to the Commission's investigatory power.[32] Indeed, this is one reason why the forfeitures sought by some Intervenors are improper.[33] As Direct Energy notes, there is no matter for any party to "prove" at hearing, since the Commission is not bound to adopt the auditor's (or any party's) recommendations. For these reasons, it is unclear why testimony should be taken at a hearing or even upon what issues party witnesses would testify. The Companies respectfully

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[30] By way of example, under R.C. 4905.95, the legislature caps "the aggregate of such forfeitures" at "one million dollars for any related series of violations or noncompliances." R.C. 4905.95(B)(1)(b). Even that one million dollar forfeiture amount would have to be tied to remedial purposes—or could be considered unconstitutionally excessive.

[31] *See supra*, at note 23.

[32] Direct Energy Comments at 2.

[33] *See supra*, at Section II.B.1.

submit that no evidentiary hearing is therefore necessary or required. Instead, the Audit Report and Daymark's thorough review speak for themselves. As shown here and in their initial comments, the Companies are prepared to take proactive measures to implement the auditor's recommendations, bolster their compliance program, and address the legitimate corporate separation concerns that have been raised. And with the Audit Report and the parties' comments on that report in hand, the Commission is already positioned to consider and make decisions based on the report's findings and recommendations.

For similar reasons, the Companies disagree that this case should be "converted" into a show cause proceeding, as Direct Energy and others suggest.[34] For one thing, Direct Energy urges the Commission to construe the Sage and Daymark Audit reports as "complaints" for purposes of R.C. 4905.26.[35] The audit reports constitute no such thing. These reports obviously do not purport to be complaints and neither ask nor recommend that the Commission find the Companies in violation of a statute or Commission rule. Further, Direct Energy would have the Commission sweep aside the procedural protections afforded to utilities in complaint cases under Commission rules and provide the Companies with no opportunity to respond to the supposed "complaints" before the hearing currently scheduled for February 2022.[36] Beyond this, neither Direct Energy nor any other party has demonstrated why a "show cause" hearing is necessary at this stage in the

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[34] *See, e.g.*, Direct Energy Comments at 2-3, 5-7; Vistra Comments at 2, 12; OMAEG Comments at 21-22. Nor should the Commission order that an "adverse inference" be drawn against the Companies at hearing, as OMAEG wrongly suggests. OMAEG Comments at 21-22. Citing no legal authority in support, OMAEG claims an "adverse interest" would be appropriate because the Companies have "fall[en] short of [their] burden of proving an affirmative defense." *Id.* at 22. Contrary to OMAEG's suggestion, there are no claims being asserted in this audit proceeding. And there are no "affirmative defenses" that the Companies have the burden to prove. OMAEG's ill-defined request for an adverse inference is legally meritless.

[35] Direct Energy Comments at 2 (arguing the Commission should construe the reports as "demonstrat[ing] reasonable grounds for complaint that FirstEnergy has violated R.C. 4928.17 and O.A.C. Chapter 4901:1-37.").

[36] *See generally* O.A.C. 4901-1-1.

proceedings. Over the course of about seven months, Daymark engaged in an extensive review of the Companies' corporate separation policies, procedures, and practices.[37] Its independent findings and recommendations are now available, and the Companies have produced to the parties all documents and data provided during the audit. Converting this case into a "show cause" proceeding would subvert and ignore the efficacy of the Commission's deliberate audit process.

D. Certain Intervenors' Calls For An Expansive, New Audit Are Improper.

Going outside the bounds of Daymark's Audit Report, certain Intervenors request that the Commission order an additional corporate separation audit of matters relating to H.B. 6. As the Companies made clear in response to OCC's motion for an audit in Case No. 20-1502-EL-UNC, the Companies do not oppose a Commission audit of political and charitable spending by, or on behalf of, the Companies related to H.B. 6, should the Commission find that such a review is appropriate.[38] But OCC and other parties continue to urge the Commission to exceed its statutory authority. In its comments, OCC demands an audit "of FirstEnergy's H.B. 6 related-activities."[39] OMAEG makes a similar argument.[40] As the Companies have explained elsewhere, these calls for an expansive audit and investigation of company affiliates, where there are no allegations of corporate separation violations, let alone any nexus to affiliate transactions, raises serious jurisdictional concerns.

[37] OCC's claim that the Companies' corporate separation practices are "unauditable" is belied by Daymark's extensive, 165-page report. *See* OCC Comments at 3. While Daymark noted that some documents were unavailable, it also expressly states that the lack of documentation "is reflected in the audit findings." Audit Report at 2. Nowhere did Daymark find the Companies "unauditable."

[38] Case No. 20-1502-EL-UNC, Companies' Memorandum Contra OCC's Revised Motion for an Independent Auditor and Motion for the PUCO To Appoint an Independent Committee (Nov. 12, 2021).

[39] OCC Comments at 36.

[40] *See* OMAEG Comments at 9 (arguing "the Audit Report completely fails to address FirstEnergy Corp.'s H.B. 6-related internal investigation.").

And for reasons the Companies have also explained in Case No. 20-1502-EL-UNC, a wholesale investigation of political spending, without limitation, is likewise foreclosed by *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 2008-Ohio-3917, ¶ 12, 119 Ohio St. 3d 301, 304, 893 N.E.2d 824, 828.[41]

Nor do R.C. 4928.17 or R.C. 4928.18 grant unfettered authority to investigate all aspects of the Companies' and their affiliates' business operations. Rather, R.C. 4928.18 is limited by its own terms to an examination of "such books, accounts, or other records kept by an electric utility or its affiliate *as may relate to the businesses for which corporate separation is required* under section 4928.17 of the Revised Code." R.C. 4928.18(B) (emphasis added). And R.C. 4928.17 is directed at ensuring that no affiliate "in the business of providing competitive retail electric service" is unfairly advantaged by its corporate relationship to a regulated utility. Indeed, the Commission has previously recognized, in the corporate separation context, that political spending "is a matter outside of our jurisdiction."[42]

And to the extent the Intervenors' comments are directed at how the costs of FirstEnergy Corp.'s political spending in support of H.B. 6 were allocated and whether any of those costs had an impact on the Companies' rates, those questions are being addressed in other Commission cases. An audit of the same issues here would therefore only be duplicative and unwarranted. For these reasons, the Companies respectfully object to Intervenor calls for an audit on *this docket* of matters related to H.B. 6, including political and charitable spending.[43]

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[41] Case No. 20-1502-EL-UNC, Companies' Memorandum Contra OCC's Revised Motion for an Independent Auditor and Motion for the PUCO To Appoint an Independent Committee (Nov. 12, 2021), at p. 4 (explaining that, under *Allstate*, an expansive investigation of political spending would fall outside the Commission's regulatory expertise and calls for review of matters unrelated to utility service).

[42] *In re Chapter 4901:1-20*, Ohio Adm. Code, 2004 WL 1950732, Case No. 04-48-EL-ORD, at p. 14.

[43] OMAEG also suggests that the Commission should audit the regulated utility money pool. OMAEG Comments at 13-14. Beyond speculation and vague assertions, OMAEG offers no reasonable argument for how the

III. CONCLUSION

The Companies are committed to enhancing their compliance practices and working collaboratively with the Commission and other stakeholders on that effort. The Companies appreciate the Intervenors' comments and the opportunity to find common ground on many issues. The Companies restate their request that the Commission accept the Audit Report's recommendations as outlined in the Companies' Initial Comments.

Dated: December 13, 2021

Respectfully submitted,

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On behalf of the Companies

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mere existence of the regulated money pool—in which the Companies are approved by the Commission annually to participate—raises a corporate separation concern. And indeed, the Auditor's extensive review found that the Companies' financial arrangement are in compliance with applicable law and rules. *See* Audit Report at 8-9.

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 Commission's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Ryan A. Doringo
Attorney for the Companies