

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY COMMENTS
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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I. INTRODUCTION

The above-captioned proceeding pertains to violations of Ohio's corporate separation laws and regulations by the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the FirstEnergy Utilities), as well as their affiliates, which facilitated the largest public corruption scheme that this State has ever seen and other injustices at customers' expense by FirstEnergy Corp. and related entities.¹

On November 22, 2021, the Ohio Manufacturers' Association Energy Group (OMAEG) filed initial comments concerning the FirstEnergy Utilities and their affiliates' corporate separation practices, policies, and compliance, or lack thereof, with Ohio law and the rules of the Public Utilities Commission of Ohio (Commission). Other stakeholders that filed comments regarding the FirstEnergy Utilities and their affiliates' corporate separation violations included the Office of the Ohio Consumers' Counsel (OCC), Vistra Energy Corp. (Vistra), Direct Energy Business, LLC

¹ The former United States Attorney for the Southern District of Ohio characterized the Am. Sub. H.B. 6 (H.B. 6) scandal as "likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio". WSYX ABC 6, *U.S. Attorney Update on Arrest of Ohio House Speaker Larry Householder and Four Associates*, YOUTUBE (Streamed live on July 21, 2020) (statement starting at 00:48), <https://www.youtube.com/watch?v=mYTY9GUnHMM>.

and Direct Energy Services, LLC (collectively, Direct), Industrial Energy Users of Ohio (IEU), Northeast Ohio Public Energy Council (NOPEC), and Interstate Gas Supply, Inc. (IGS). The FirstEnergy Utilities also filed comments.

As aptly stated in one stakeholder’s initial comments, “[t]he question is no longer whether FirstEnergy has complied with corporate separation rules; the question is what should be done to address documented evidence of non-compliance.”² OMAEG appreciates the actions of the Commission taken thus far and agrees that the time is now to hold the FirstEnergy Utilities, their affiliates, and FirstEnergy Corp. accountable for the documented corporate separation violations and to rectify some of the harm that customers incurred.

In accordance with the Commission’s Entry on October 12, 2021, as modified on November 12, 2021,³ OMAEG hereby files in its reply comments regarding the FirstEnergy Utilities and their affiliates’ corporate separation deficiencies.

The purpose of the Commission’s corporate separation rules is to “create competitive equality, prevent unfair competitive advantage, prohibit the abuse of market power and to effectuate the policy of the state of Ohio...”⁴ including “avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa...”⁵

The September 13, 2021 “Compliance Audit of the FirstEnergy Operating Companies” (Audit Report) filed in the above-captioned proceeding by Daymark Energy Advisors (Daymark or the Auditor) was supposed to evaluate whether the FirstEnergy Utilities complied with Ohio’s

² Direct Comments at 1 (November 22, 2021).

³ Entry at ¶ 28 (November 12, 2021).

⁴ Ohio Adm. Code 4901:1-37-02(B).

⁵ R.C. 4928.02(H).

corporate separation requirements for the period of 2016-2020, including the time period leading up to the passage of H.B. 6 and the subsequent referendum effort.⁶ This, however, did not occur because the Audit Report failed to evaluate documented abuses of the regulated FirstEnergy Utilities' corporate form during the audit period that were intended to benefit their competitive affiliates. For example, the Audit Report does *not* address the costs misallocated to the FirstEnergy Utilities for payments to enact the \$1.1 billion nuclear bailout of their former affiliate, FirstEnergy Solutions (now Energy Harbor)⁷ or costs misallocated to the FirstEnergy Utilities to secure favorable regulatory treatment for their affiliate Suvon LLC, d/b/a FirstEnergy Advisors.⁸ Therefore, the Commission should adopt stakeholders' recommendations and order a supplemental, comprehensive, and more expansive corporate separation audit. Doing so will determine the true extent of harm to customers that is directly attributable to the corporate separation violations of the FirstEnergy Utilities and their affiliates.

Even with its limited review, the Auditor found 21 distinct corporate separation violations of the FirstEnergy Utilities and their affiliates that must be addressed.⁹ For example, the Audit Report determined that the FirstEnergy Utilities have little to no formalized processes or procedures for addressing corporate separation compliance.¹⁰ The Ohio Revised Code and Ohio Adm. Code specify that all electric distribution utilities (EDUs) must have a corporate separation plan and maintain a Cost Allocation Manual (CAM) sufficient to protect against market abuses.¹¹

⁶ Entry at ¶ 1 (November 4, 2020).

⁷ See Case No. 20-1629-EL-RDR, Rider DCR Audit Report Expanded Scope at 27 (August 2, 2021).

⁸ See FirstEnergy Corp. Deferred Prosecution Agreement, Case No. 1:21-CR-86 (S.D. Ohio July 20, 2021); see Case No. 20-1629-EL-RDR, Rider DCR Audit Report Expanded Scope at 27 (August 2, 2021).

⁹ Audit Report at 7.

¹⁰ *Id.* at 6.

¹¹ See, e.g., R.C. 4928.17 and Ohio Adm. Code 4901:1-37-08.

Accordingly, the Commission should adopt stakeholders' recommendations and require the FirstEnergy Utilities to develop and specifically adhere to a new corporate separation plan and the CAM.

Based on findings in the Audit Report, stakeholders also recommended that the Commission order the FirstEnergy Utilities and FirstEnergy Service Company (FESC) to structurally separate from FirstEnergy Products, FirstEnergy Advisors, FirstEnergy Home, and any other affiliate that offers competitive or non-electric products and services.¹² OMAEG supports this recommendation because it will help prevent the comingling of competitive and regulated businesses, products, and services, which is the objective of Ohio's corporate separation requirements.

Further, while the Commission has set the above-captioned case for a February 10, 2022 evidentiary hearing,¹³ the precise purpose, scope, and evidentiary burden of the hearing has yet to be determined. Consistent with recommendations articulated in stakeholders' initial comments,¹⁴ OMAEG requests that the Commission direct the FirstEnergy Utilities to demonstrate that they are not in violation of their Commission-approved corporate separation plan and Ohio's corporate separation laws and regulations. Establishing that the FirstEnergy Utilities have the burden of proof to show that they have complied with the Commission's rules and Ohio law will provide parties' guidance as they prepare for the forthcoming evidentiary hearing and will ensure an equitable process.

Finally, the FirstEnergy Utilities and their affiliates need to be held accountable for their corporate separation violations. Issuing the FirstEnergy Utilities substantial forfeitures and

¹² See OMAEG's Comments at 18-19 (November 22, 2021); Vistra's Comments at 3-5 (November 22, 2021).

¹³ Entry at ¶ 23 (October 12, 2021).

¹⁴ See Direct's Comments at 5 (November 22, 2021).

preventing affiliates of the FirstEnergy Utilities from offering competitive retail electric services (CRES) in Ohio for a period of five years will protect customers and contribute to a well-functioning competitive market free from abuse of market power.

II. REPLY COMMENTS

A. The Commission Should Order a Supplemental, Comprehensive, and More Expansive Audit.

OMAEG and other stakeholders' initial comments expressed concern that the scope of the Audit Report is insufficient to protect customers from corporate separation violations and is inconsistent with the Commission's prior directives.¹⁵ Notably, the Audit Report did not evaluate: (1) the costs allocated to the FirstEnergy Utilities to support dark money groups at the heart of the H.B. 6 bribery scheme;¹⁶ (2) the records of FirstEnergy's Chief Ethics Officer, who was responsible for corporate separation compliance during the audit period and approximate timeframe of the H.B. 6 bribery scheme;¹⁷ (3) the costs misallocated to the FirstEnergy Utilities from a \$4.3 payment from FirstEnergy Corp. to the former Commission Chair's consulting company in exchange for favorable regulatory treatment;¹⁸ (4) *ex parte* communications between the former Commission Chair and the Director of the FirstEnergy Utilities concerning their affiliate's CRES application;¹⁹ (5) over a decade of other misallocated costs to the FirstEnergy Utilities from unsupported transactions;²⁰ and (6) FirstEnergy Corp.'s internal H.B. 6 investigatory

¹⁵ See, e.g., OMAEG's Comments at 7-14 (November 22, 2021); OCC's Comments at 2-4 and 36-37 (November 22, 2021); NOPEC's Comments at 2-3 (November 22, 2021).

¹⁶ See Case No. 20-1629-EL-RDR, Rider DCR Audit Report Expanded Scope at 27 (August 2, 2021).

¹⁷ See OMAEG's Comments at 7 (November 22, 2021) (citing Audit Report at 1-2).

¹⁸ See FirstEnergy Corp. Deferred Prosecution Agreement, Case No. 1:21-CR-86 (S.D. Ohio July 20, 2021); see Case No. 20-1629-EL-RDR, Rider DCR Audit Report Expanded Scope at 27 (August 2, 2021).

¹⁹ See Attachment B to OMAEG's Comments (November 22, 2021).

²⁰ See FirstEnergy Corp.'s Form 10-K (February 18, 2021), <https://www.sec.gov/Archives/edgar/data/1031296/000103129621000021/fe-20210218.htm>.

report that led to the termination of certain corporate officers and prompted the Commission to initiate the above-captioned proceeding.²¹

For these reasons, OMAEG disagrees with the statements of the FirstEnergy Utilities and one stakeholder that the Audit Report is thorough, comprehensive, well-documented, and easily understood.²² In fact, it is now known that at the direction of a Staff member, the Auditor did not consider *any* H.B. 6-related information when auditing the FirstEnergy Utilities and their affiliates.²³

As further explained in OMAEG and others' initial comments, the Commission stated that the corporate separation audit was to include an "*examination of the time period leading up to the passage of Am. Sub. H.B. 6 and the subsequent referendum*" and that FirstEnergy Corp.'s H.B. 6-related disclosures with the United States Securities and Exchange Commission (SEC) "requires...additional action to ensure compliance by the [FirstEnergy Utilities] and their affiliates with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plan."²⁴ In addition, the above-captioned proceeding is currently listed under "FirstEnergy & HB 6 related cases" on the Commission's publicly accessible website.²⁵ The Audit Report falls woefully short of the Commission's directive by overlooking

²¹ See OMAEG's Comments at 9-10 (November 22, 2021) (citing Entry at ¶ 17 (November 4, 2020) ("The information supplied by FirstEnergy Corp. in the Form 8-K requires that we take additional action to ensure compliance by the Companies and its affiliates with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plans.")).

²² See the FirstEnergy Utilities' Comments at 1 (November 22, 2021); Direct's Comments at 5 (November 22, 2021).

²³ See Attachment A to OMAEG's Comments (November 22, 2021).

²⁴ Entry at ¶ 1 November 4, 2020) (emphasis).

²⁵ See *FirstEnergy & H.B. 6 Related Cases*, PUCO.GOV, <https://puco.ohio.gov/wps/portal/gov/puco/utilities/electricity/resources/hb-6-related-investigations>.

all H.B. 6-related information and likely what constitutes other major violations of Ohio's corporate separation requirements (among other laws).

Accordingly, OMAEG respectfully requests that the Commission order a supplemental, comprehensive, and more expansive audit of the FirstEnergy Utilities and their affiliates' compliance with Ohio's corporate separation requirements, including a thorough examination of the issues delineated above.

B. The Commission Should Require the FirstEnergy Utilities to Develop a New Corporate Separation Plan and Address Deficiencies in Their Cost Allocation Manual.

The Audit Report and stakeholders' initial comments make it clear that the FirstEnergy Utilities and their affiliates are devoid of cohesive and effective corporate separation policies and practices. Even with a limited review based solely on the FirstEnergy Utilities' voluntary disclosures, the Audit Report concluded that the FirstEnergy Utilities violated approximately half of Ohio's corporate separation requirements²⁶ and "have *no* detailed processes or procedural documents addressing corporate separation compliance."²⁷ As a result, customers have little to no assurance that the rates that they have paid and continue to pay are just, reasonable, and lawful or that the various FirstEnergy entities are not abusing market power at their expense. To rectify this outcome, the Commission should require the FirstEnergy Utilities to develop a new corporate separation plan and address major deficiencies identified in their CAM.

R.C. 4928.17 expressly prohibits EDUs from operating in Ohio, "unless *the utility implements* and operates under a corporate separation plan that is approved by the public utilities commission...." (Emphasis added). An EDU's corporate separation plan must ensure that

²⁶ See OMAEG Comments at 15 (November 22, 2021) (citing Audit Report at 7).

²⁷ *Id.* at 19 (citing Audit Report at 6).

regulated entities, like the FirstEnergy Utilities, are fully separated from their competitive affiliates who offer CRES or non-electric products, including separate accounting, separate codes of conduct, and “such other measures as necessary to effectuate...” Ohio’s codified public policy.²⁸ Additionally, the corporate plan must “satisf[y] the public interest in preventing unfair competitive advantage and preventing the abuse of market power”²⁹ and be “sufficient to ensure that the [EDU] will not extend any undue preference or advantage to any affiliate, division, or part of its own business....”³⁰

Under R.C. 4928.17(D), any party may petition the Commission for an amendment to an EDU’s corporate separation plan and the Commission “pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.” In their initial comments in the above-captioned proceeding, parties have urged the Commission to order the FirstEnergy Utilities to file a new corporate separation plan that meets the foregoing requirements, identified numerous deficiencies in the existing corporate separation plan, and explained why current circumstances warrant the adoption of their request.³¹

For example, OCC’s initial comments noted that the FirstEnergy Utilities’ existing corporate separation plan is “unauditable” because the Auditor was not provided access to the records of FirstEnergy’s Chief Compliance Officer from the audit period.³² This is a violation in

²⁸ R.C. 4928.17(A)(1).

²⁹ R.C. 4928.17(A)(2).

³⁰ R.C. 4928.17(A)(3).

³¹ *See, e.g.*, OMAEG’s Comments at 20 (November 22, 2021); OCC’s Comments at 33 (November 22, 2021); NOPEC’s Comments at 23 (November 22, 2021); IGS’ Comments at 14-17; IEU’s Comments at 4 (November 22, 2021); Direct’s Comments at 8-10 (November 22, 2021); Vistra’s Comments at 10-11 (November 22, 2021).

³² OCC’s Comments at 6 (November 22, 2021).

itself because the FirstEnergy Utilities are required to “maintain records sufficient to demonstrate compliance” with the corporate separation rules and must produce relevant books, accounts, or records upon Staff’s request.³³ But the Auditor failed to cite this fundamental violation as a violation—the Auditor did not include it in the 21 violations listed.

Without reviewing those records, how can anyone possibly conclude that the corporate separation plan “satisfies the public interest in preventing unfair competitive advantage and preventing abuse of market power?”³⁴ It is clear that the FirstEnergy Utilities’ existing corporate separation plan is not meeting these statutory and regulatory requirements because if it were there would not have been 21 distinct corporate separation violations cited in the Audit Report.³⁵ Again, the Audit Report never examined the massive corporate separation failures related to the H.B. 6 bribery scheme,³⁶ FirstEnergy Advisors’ CRES certification,³⁷ or decades of costs that were misallocated to the FirstEnergy Utilities,³⁸ which further demonstrate that the existing corporate separation plan and the FirstEnergy Utilities’ implementation of such plan has been disastrous for customers and insufficient to protect against market manipulation.

As further explained in the Audit Report and stakeholders’ comments, the existing corporate separation plan and the FirstEnergy Utilities’ implementation is also deficient because the plan only covers the Federal Energy Regulatory Commission’s (FERC) code of conduct

³³ Ohio Adm. Code 4901:1:37-07(A).

³⁴ R.C. 4928.17(A)(2)

³⁵ Audit Report at 7.

³⁶ See Attachment A to OMAEG’s Comments (November 22, 2021); Case No. 20-1629-EL-RDR, Rider DCR Audit Report Expanded Scope at 27 (August 2, 2021).

³⁷ See Attachment B to OMAEG’s Comments and OMAEG’s Comments at 16-18 (November 22, 2021)

³⁸ See FirstEnergy Corp.’s Form 10-K (February 18, 2021), <https://www.sec.gov/Archives/edgar/data/1031296/000103129621000021/fe-20210218.htm>.

requirements rather than incorporating the more extensive Ohio-specific requirements,³⁹ does not provide for proper employee training,⁴⁰ or ensure adequate monitoring and oversight.⁴¹

Direct's comments discussed how the FirstEnergy Utilities' corporate separation plan is overall vague, insufficient, incomplete and that the FirstEnergy Utilities bear the burden to develop and implement a lawful corporate separation plan, *not the Commission nor stakeholders*.⁴² OMAEG agrees with Direct and respectfully requests that the Commission use its authority under R.C. 4928.17(D) and direct the FirstEnergy Utilities to develop and implement a compliant corporate separation plan.

Ohio Adm. Code 4901:1-37-08 further requires EDUs to maintain a CAM "documenting how costs are allocated between the electric utility and affiliates and the regulated and non-regulated operations" to prevent cross-subsidization. This rule is significant because misallocated costs to the FirstEnergy Utilities by its parent company and affiliates helped facilitate the largest public corruption scandal ever perpetrated in Ohio⁴³ and decades of unsupported transactions that resulted in charges to customers.⁴⁴ Unfortunately, the FirstEnergy Utilities treated the CAM as a mere suggestion instead of diligently implementing the CAM to protect customers against market abuses.

³⁹ See, e.g., OMAEG's Comments at 20 (November 22, 2021) (citing Audit Report at 6,11); OCC's Comments at 14 (November 22, 2021); Vistra's Comments at 10 (November 22, 2021); Direct's Comments at 10 (November 22, 2021).

⁴⁰ See OCC's Comments at 16-17 (citing R.C. 4928.17(A)(3)).

⁴¹ *Id.* at 17-19.

⁴² Direct's Comments at 8-10 (November 22, 2021)

⁴³ See, e.g., OMAEG's Comments at 15-20 (November 22, 2021); OCC's Comments at 5 (November 22, 2021); NOPEC's Comments at 5 (November 22, 2021).

⁴⁴ See FirstEnergy Corp.'s Form 10-K (February 18, 2021), <https://www.sec.gov/Archives/edgar/data/1031296/000103129621000021/fe-20210218.htm>.

The Commission specifically tasked the Auditor to “perform a thorough review of transactions subject to the Companies’ cost allocation manual.”⁴⁵ As a threshold issue, the Audit Report stated that “[w]e did not look into every transaction in detail...but rather focused on high-level spending trends and the processes by which costs were allocated by allocation factor.”⁴⁶ This high-level review appears to be inconsistent with the Commission’s directive to thoroughly review the transactions subject to the CAM.

The Audit Report further states, “it took FirstEnergy nearly a month to assemble and deliver all the pieces of the CAM”⁴⁷ and “[s]everal employees confirmed that there were no state-specific cost allocation manuals.”⁴⁸ For these reasons alone, it is clear that the FirstEnergy Utilities violated Ohio Adm. Code 4901:1-37-08 by failing to maintain a CAM that is complete and compliant with Ohio’s corporate separation laws and regulations.

Disturbingly, it has also become known that the FirstEnergy Utilities play little to no part in maintaining the CAM, there is no formalized process for disputing an allocated charge, and “*the Ohio Companies have no control over the costs allocated to them by FESC.*”⁴⁹ The Audit Report all too politely states, “Ohio Company staff have little visibility into what is being charged to them” and “Ohio Company staff should be made aware of and understand all charges that are being allocated to them.”⁵⁰

Stakeholders urged the Commission to order the FirstEnergy Utilities to be more accountable for the allocations to the regulated utilities from affiliated companies and submit proof

⁴⁵ See the Commission’s Request for Proposal at 2 (November 4, 2020).

⁴⁶ Audit Report at 78.

⁴⁷ *Id.* at 81.

⁴⁸ *Id.*

⁴⁹ *Id.* at 82 (emphasis added).

⁵⁰ *Id.* at 14.

of compliance with the corporate separation rules to the Commission as necessary.⁵¹ The FirstEnergy Utilities, however, apparently do not think they bear any responsibility for any charges misallocated to them by their affiliate, stating:

However, to the extent Daymark is recommending that the Companies should bear responsibility for monitoring and resolving any errors in the charges allocated to them from FirstEnergy Service Company, this would negate the efficiency benefits of having these functions centralized at FirstEnergy Service Company. It is FirstEnergy Service Company, not the Companies, that administers budgeting of FirstEnergy Service Company costs and allocation of those costs to the Companies. Therefore, FirstEnergy Service Company is better positioned to monitor allocated charges, including comparisons against forecasts, identifying variances, and remedying issues as needed. Because the Companies 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. Further, as noted above, the Companies have accepted the recommendations of implementing more robust internal and external cost allocation auditing processes, as well as an internal timesheet auditing process.⁵²

As explained above, Ohio Adm. Code 4901:1-37-08(A) provides, “[e]ach *electric utility* that receives products and/or services from an affiliate and/or that provides products and/or services to an affiliate shall maintain information in the CAM, documenting how costs are allocated between the electric utility and affiliates and the regulated and nonregulated operations.” (Emphasis added). Ohio Adm. Code 4901:1-37-08B) further specifies that “[t]he CAM will be *maintained by the electric utility*.” (Emphasis added). Thus, any attempt of the FirstEnergy Utilities to balk at their cost allocation, recordkeeping, or accounting responsibilities in regards to the CAM should be outright rejected pursuant to the plain language of the Commission’s rules. In addition, the FirstEnergy Utilities and FESC share many of the same officers so, presumably, many

⁵¹ See IEU’s Comments at 4-5; Vistra’s Comments at 10-11 (November 22, 2021).

⁵² The FirstEnergy Utilities’ Comments at 4 (November 22, 2021).

of the same individuals would be responsible for ensuring accuracy of the CAM and costs allocations to the FirstEnergy Utilities regardless.⁵³

In sum, OMAEG urges the Commission to adopt stakeholders' recommendations and require the FirstEnergy Utilities to develop and file with the Commission a new and compliant corporate separation plan and to hold the FirstEnergy Utilities accountable for properly maintaining the CAM. Given the pattern and severity of non-compliance, the FirstEnergy Utilities should also be periodically audited to ensure compliance with their revamped formal corporate separation policies and procedures.

C. The Commission Should Adopt Stakeholders' Recommendations Regarding Products and Services Offered by Affiliates of the FirstEnergy Utilities.

In addition to the aforementioned corporate separation violations, the Audit Report and initial stakeholder comments identified corporate separation violations related to the products and services offered by FirstEnergy Utilities' affiliates.⁵⁴ For example, some stakeholders' initial comments recommended that the Commission order the FirstEnergy Utilities and FESC to structurally separate from FirstEnergy Products, FirstEnergy Advisors, FirstEnergy Home, and any other affiliate, now or in the future, that offers competitive or non-electric products and services.⁵⁵ Based on a finding in the Audit Report, many initial comments also expressed concerns that affiliates of the FirstEnergy Utilities are unfairly advantaged by using the "FirstEnergy" name when marketing products to customers, in violation of the Commission's rules.⁵⁶ Therefore, OMAEG respectfully requests that the Commission adopt these recommendations regarding

⁵³ See NOPEC's Comments at 17 (November 22, 2021).

⁵⁴ OMAEG's Comments at 18-19 (November 22, 2021); Vistra's Comments at 3-5 (November 22, 2021).

⁵⁵ IEU's Comments at 3 (November 22, 2021) (citing Audit Report at 63); OCC's Comments at 35-36 (November 22, 2021).

⁵⁶ OMAEG's Comments at 19 (November 22, 2021); NOPEC's Comments at 12-15 (November 22, 2021); IGS' Comments at 30-34 (November 22, 2021); Audit Report at 10.

competitive or non-electric products and services to further protect customers against market manipulation.

D. The Commission Should Order the FirstEnergy Utilities to Bear the Burden of Proof That They Are Not in Violation of Ohio’s Corporate Separation Requirements.

The burden of proof and scope of the issues in the above-captioned proceeding have not been specified at this time. As noted in Direct’s comments, R.C. 4928.18 and 4905.26 provide the Commission with jurisdiction, “upon complaint of any person or upon complaint or initiative of the Commission...” to determine whether an EDU or its affiliate have violated any of Ohio’s corporate separation requirements.⁵⁷ Direct’s comments further recommended that the FirstEnergy Utilities should be ordered to show cause why they should not be found in violation of R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37.⁵⁸

OMAEG supports this recommendation as it will provide parties necessary information to prepare for the February 10, 2022 evidentiary hearing. Moreover a show cause order is consistent with both the Commission’s approach in Case No. 20-1502-EL-UNC, which concerns the FirstEnergy Utilities’ political and charitable spending in support of H.B. 6⁵⁹ and Ohio Adm. Code 4901:1-37-02(E), which states, “[t]he electric utility has the burden of proof to demonstrate compliance with this chapter.” Lastly, adhering to an accepted and consistent approach will ensure an equitable evidentiary hearing and reduce the likelihood of procedural errors being raised on appeal. Accordingly, OMAEG respectfully requests that the Commission order the FirstEnergy

⁵⁷ See Direct’s Comments at 5 (November 22, 2021).

⁵⁸ *Id.* at 2-3.

⁵⁹ See *In the Matter of the Review of the Political and Charitable Spending by the FirstEnergy Utilities*, Case No. 20-1502-EL-UNC, Entry at ¶ 5 (September 15, 2021) (stating that “the Companies are directed to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state.”).

Utilities to bear the burden of proof to demonstrate that they are in compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37.

E. The Commission Should Ensure that FirstEnergy Advisors is Not Marketing to or Soliciting Customers Without the Necessary Certification and is not in Violation of the Remand Order.

On November 3, 2021, the Commission issued its Remand Order, stating:

[P]ursuant to R.C. 4928.10, [FirstEnergy Advisors] may not engage in the marketing, solicitation, sale or provision of aggregation service or power brokerage service until [FirstEnergy Advisors] has been certified by the Commission to provide such service. Accordingly, the Commission cannot permit [FirstEnergy Advisors] to continue advising its current customers as [FirstEnergy Advisors] requests.⁶⁰

NOPEC's comments raised concerns regarding FirstEnergy Advisors' continued web-based marketing and solicitation of Ohio customers for power broker and aggregation services.⁶¹ Pursuant to the Remand Order, FirstEnergy Advisors is no longer certified to engage in such activities and should be required to inform customers in a conspicuous manner on their website. Doing so will help protect Ohioans against an entity who has not demonstrated that it has the requisite managerial, technical, and financial capability to be a CRES broker/aggregator in the State.

As discussed above, there is reason to believe that cross-subsidization may have occurred where money was allocated to the regulated FirstEnergy Utilities in order to provide their competitive affiliate, FirstEnergy Advisors, with favorable regulatory treatment.⁶² If true, then

⁶⁰ *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. 20-103-EL-AGG, Order on Remand at ¶ 11 (Remand Order) (November 3, 2021).

⁶¹ NOPEC's Comments at 15 (November 22, 2021).

⁶² *See* FirstEnergy Corp. Deferred Prosecution Agreement, Case No. 1:21-CR-86 (S.D. Ohio July 20, 2021); *see* Case No. 20-1629-EL-RDR, Rider DCR Audit Report Expanded Scope at 27 (August 2, 2021).

these actions would constitute a major corporate separation violation and require further scrutiny by the Commission.

F. The Commission Should Assess Forfeitures to the FirstEnergy Utilities and Prohibit Affiliates from Providing Competitive Retail Electric Service in the State for a Minimum of Five Years.

As OMAEG advocated in its initial comments, the Commission should use its authority under R.C. 4928.18 to assess forfeitures to the FirstEnergy Utilities in the amount of \$25,000 per day for each of the 21 violations that occurred during the audit period and that were cited in the Audit Report.⁶³ Other stakeholders also supported the recommendation that the Commission should assess substantial forfeitures given the severity and repetitious nature of the corporate separation violations.⁶⁴ Hopefully, such forfeitures will serve as a deterrent to the FirstEnergy Utilities or any other EDU in the State that fails to follow Ohio's corporate separation requirements.

In addition, OCC and NOPEC recommended that any affiliate of the FirstEnergy Utilities should be prohibited from operating as a CRES provider in Ohio for a minimum of five years.⁶⁵ This outcome would be consistent with Commission precedent,⁶⁶ and be appropriate in light of the severity of FirstEnergy Advisors' actions, including withholding the fact that its CRES application process was tainted up until the very last moment when it was required to withdraw its application

⁶³ OMAEG's Comments at 23-24 (November 22, 2021).

⁶⁴ NOPEC's Comments at 20-22 (November 22, 2021); OCC's Comments at 29-32 (November 22, 2021); IGS' Comments at 26 (November 22, 2021).

⁶⁵ OCC's Comments at 34-35 (November 22, 2021); NOPEC's Comments at 21 (November 22, 2021).

⁶⁶ See NOPEC's Comments at 21 (citing *In Re PALMco Power*, Case No. 19-2153-GE-COI, Finding and Order (October 20, 2021) (the Commission adopting a stipulation prohibiting PALMco from owning a CRES in Ohio for a period of seven years); *In Re Application of One Source Energy, LLC*, Case No. 16-1181-GA-ACE, Third Finding and Order (August 22, 2019) (the Commission Ordering One Source to retire and abandon its natural gas system for failure to comply with the Commission's rules and orders, including keeping its website activated after be ordered to cease customers solicitations).

on November 2, 2021.⁶⁷ FirstEnergy Advisors' actions appear to be intentionally deceitful and at a minimum, have wasted the precious time and resources of the Supreme Court of Ohio, the Commission, and parties in litigating what amounted to be a sham of an application.⁶⁸ Accordingly, it is only fair that FirstEnergy Advisors, and any other FirstEnergy Utilities' affiliate, be prohibited from providing CRES in Ohio for a minimum of five years.

III. CONCLUSION

For the foregoing reasons, OMAEG respectfully requests that the Commission adopt its recommendations articulated in its initial comments filed on November 22, 2021 and herein.

Respectfully submitted,

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⁶⁷ *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. 20-103-EL-AGG, FirstEnergy Advisors' Motion at 1 (November 2, 2021).

⁶⁸ *See* NOPEC's Comments at 20-21 (November 22, 2021).

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on December 13, 2021 upon the parties listed below.

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