UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

FirstEnergy Corp. Docket No. EC21-77

Motion to Answer and Answer of Public Citizen and Citizens Utility Board of Ohio

Commission regulations prohibit answers to an answer unless otherwise authorized.[1] But the Commission accepts answers when they provide information that assist in its decision-making process. We ask the Commission to permit this answer because FirstEnergy's June 9 filing with the Maryland Public Service Commission (PSC) seeks to block state regulatory review of the proposed transaction. FirstEnergy's decision to prevent state review of the proposed transaction imperils "effective state regulation" and underscores the need to classify the Icahn Group as affiliates of FirstEnergy.

Our May 4 Protest noted that Commission regulations stipulate: "Where the affected state commissions do not have authority to act on the transaction, the Commission may set for hearing the issue of whether the transaction would impair effective state regulation"[2] and we advocated that "if no state regulators have jurisdiction, we ask the Commission to consider setting the issue for hearing of whether the transaction impairs effective state regulation."[3]

In their May 12 reply to our Protest, FirstEnergy and the Icahn Group argue that "no state regulator has intervened or raised concerns about the Proposed Transaction's effect on regulation. Moreover, as the Applicants noted in the Application, they engaged in state regulator outreach regarding the Proposed Transaction. Accordingly, there is no reason for the Commission to institute a hearing about the Proposed Transaction's effect on regulation, and the Joint Protest's demand should be rejected."[4]

[1] 18 CFR § 385.213(a)(2).
[2] 18 CFR § 2.26(e)(2).
[3] Protest, at page 4.
[4] FirstEnergy/Icahn Answer, at page 5.

On May 11, the Maryland Office of People's Counsel (OPC) filed a petition with the Maryland PSC that, among other things, requested Maryland utility regulators to review the Icahn transaction. On June 9, FirstEnergy responded by arguing that the Maryland PSC "should deny OPC's petition to review the Agreement".[5] FirstEnergy's response filed with the Maryland PSC is attached as Exhibit A. This decision by FirstEnergy to oppose efforts for state regulatory review of the proposed transaction directly imperils "effective state regulation."

It is important to remind the Commission that the board members that are the subject of this proposed transaction— Andrew Teno and Jesse A. Lynn—are not independent directors, but are high ranking executives directly employed by the Icahn Group. Mr. Teno is portfolio manager of Icahn Capital LP, and Mr. Lynn is general counsel of Icahn Enterprises LP. The Icahn Group therefore has clear control over both of these board seats.

The Icahn Group's effort to secure two of its executives as voting members of FirstEnergy's board of directors must render the Icahn Group as an affiliate under 18 CFR § 35.36(a)(9)(iii).

Respectfully submitted,

Tyson Slocum, Energy Program Director
Public Citizen, Inc.
215 Pennsylvania Ave SE
Washington, DC 20003
(202) 454-5191
tslocum@citizen.org

Tom Bullock, Executive Director
Citizens Utility Board of Ohio
1145 Chesapeake Ave, Suite I
Columbus, OH 43212
440-554-7203
tbullock@cuboh.org

Filed June 15, 2021

[5] FirstEnergy Response to Maryland OPC, attached as Exhibit A, at page 16.

EXHIBIT A

VENABLE LLP

750 E. PRATT STREET SUITE 900 BALTIMORE, MD 21202
T 410.244.7400 F 410.244.7742 www.Venable.com

VIA E-FILING

J. Joseph Curran, III

T 410.244.5468
F 410.244.7742
JCurran@venable.com

June 9, 2021

Andrew S. Johnston, Executive Secretary
Maryland Public Service Commission
William Donald Schaefer Tower
6 St. Paul Street, 16th Floor
Baltimore, MD 21202

Re: In the Matter of the Petition of People's Counsel to Investigate the Future of FirstEnergy's Relationship with Potomac Edison in Light of Recent Events

Dear Executive Secretary Johnston:

On May 11, 2021, the Maryland Office of People's Counsel ("OPC") filed a document entitled "Petition of the Office of People's Counsel to Investigate the Future of FirstEnergy's Relationship with Potomac Edison in Light of Recent Events" (the "Petition"). The Potomac Edison Company ("Potomac Edison" or the "Company") herein respectfully requests the Commission's permission to submit the following letter in response to the Petition, on the grounds that the information and analysis Potomac Edison supplies will facilitate the Commission's ability to resolve what action, if any, is warranted by the Petition.

As discussed in more detail herein, in its Petition, OPC makes a series of allegations about the condition of Potomac Edison and of its relationship with its corporate parent, FirstEnergy Corp. ("FirstEnergy"), which are either baseless or are built upon a misunderstanding (or misstating) of publicly-available facts. With the benefit of the information and context provided in this letter, the Commission should conclude that OPC's fifteen requested steps are unwarranted and, in many cases, beyond the scope of the Commission's proper jurisdiction. Accordingly, as again is discussed in detail below, each of OPC's requests should be denied.

I. Responses to OPC's Specific Requests and Allegations

At pages 24-25 of the Petition, OPC enumerates fifteen specific steps that it is asking the Commission to take. For the reasons discussed below, none of those actions are warranted, and many of them would be improper.

1. ***"Whether the Commission should order the divestiture of Potomac Edison by FirstEnergy."***

OPC's request that the Commission consider divesting Potomac Edison from FirstEnergy should not be seriously considered. Any effort at pursuing divestiture appears to be well beyond the Commission's general powers conferred under Public Utilities Article ("PUA") Section 2-112[1] and would be at the very least inconsistent with the Commission's obligation to ensure that Potomac Edison is operating in the public interest.[2] OPC's request that the Commission consider "divestiture" appears more intended as a means for OPC to grab attention rather than as a serious means for the Commission to discharge its proper supervisory and regulatory duties.

Moreover, even if forcing the divestiture of Potomac Edison was something the Commission could consider, OPC's request glosses over the harmful effects of such a draconian action.[3] Potomac Edison and its customers enjoy substantial cost savings and other benefits from being part of a family of ten electric distribution companies, as the Commission anticipated when it approved the FirstEnergy-Allegheny merger.[4] OPC is now asking the Commission to undo those savings and potentially impose substantial unnecessary costs and complications on the Company and its customers. To take just a few examples of the possible pernicious consequences of OPC's proposal:

- Potomac Edison uses the Transmission Control Center in Fairmont, West Virginia, and the Distribution Control Center in Greensburg, Pennsylvania, and has other backups for both functions available elsewhere in the FirstEnergy footprint. The need to create replacements for all those functions, and loss of the backups, would result from divestiture.

- Potomac Edison uses centralized FirstEnergy personnel and systems for customer billing, work management, storm response, vegetation management, finance functions, such as treasury and accounting, legal functions, employee payroll, and other shared

[1] Divestiture may also present an issue regarding compensation to FirstEnergy for the "taking" of Potomac Edison's Maryland operations. The Takings Clause prohibits the taking of private property for public use, without just compensation. United States Constitution, Article V, XIV; *see also Ir. v. Shipley*, 166 A. 593, 596 (Md. 1933) (stating that the State "has not the power to destroy vested rights without compensation ....").

[2] *See* PUA § 2-113(a)(1)(i). It is unclear from OPC's request what form a divestiture could possibly take, and how the Commission could coordinate such a transaction with West Virginia and Virginia regulators (assuming those regulatory agencies do not oppose divestiture). Moreover, as highlighted below, pulling Potomac Edison's Maryland operations out of FirstEnergy (and therefore out of Potomac Edison's West Virginia and Virginia operations) would undoubtedly increase customer costs and leave a weaker, less robust utility to operate in Maryland.

[3] OPC's Petition also fails to consider the jurisdiction of the other states in which Potomac Edison operates (West Virginia and Virginia) and whether it is even feasible to separate Potomac Edison's Maryland assets and operations from its West Virginia and Virginia assets and operations.

[4] *See, e.g.*, Case No. 9233, Order No. 83799 (Jan. 18, 2011) at 34 (the merger "will pay off for Potomac Edison's ratepayers primarily in the form of efficiencies and savings in the operation of Potomac Edison as a utility.").

services, all of which functions the Company would have to replace if divestiture were ordered.

- Potomac Edison's transmission planning, construction, and maintenance functions are part of larger FirstEnergy departments and programs which would need to be replaced if divestiture were ordered.

- Potomac Edison's customers enjoy the benefit of having personnel and equipment from the other nine FirstEnergy utilities help with storm response, which likewise would change in the event of divestiture.

- Potomac Edison customers are served by three FirstEnergy call centers, none of which are located in Maryland. Divestiture could require the time and expense to create a new Company-only call center which would, moreover, lack the back-up capabilities currently enjoyed by Potomac Edison customers from having the three FirstEnergy centers.

Equally important, however, is that, as Potomac Edison has laid out in detail in this letter, the Company is financially secure and is providing safe and reliable electric distribution service to its Maryland customers at affordable prices, all in compliance with its obligations to this Commission and its customers and under the laws and regulations of the State. Potomac Edison is doing so irrespective of the allegations and claims in OPC's Petition.

For these reasons as well, OPC's request for an investigation into forcing the divestiture of Potomac Edison is absurd on its face and should be dismissed.

2. "Whether, short of divestiture, more robust ring-fencing measures – such as the measures that the Commission has adopted in more recent Maryland utility merger proceedings – should be implemented immediately."

OPC next argues that the Commission should open an investigation to consider whether "more stringent ring-fencing measures" should be implemented for Potomac Edison.[5] But Potomac Edison and its customers are already protected by an appropriate level of ring-fencing and corporate governance measures that this Commission ordered in 2011 as conditions to the merger of FirstEnergy and Allegheny Energy, Inc. ("Allegheny Energy") (Case No. 9233). These safeguards have sufficiently protected Potomac Edison and its ratepayers for the past decade. Moreover, since the merger closed back in 2011, FirstEnergy has exited the competitive generation business and substantially all of its revenues come from its regulated businesses, which militates further against adding to the Commission's existing ring-fencing measures.

[5] OPC Petition at 14-15.

At the time of the FirstEnergy-Allegheny Energy merger, FirstEnergy operated a competitive wholesale generation business, which included "nuclear plants that have had serious and costly troubles."[6] To protect Potomac Edison "before one of the nuclear plants runs into trouble," the Commission considered in Case No. 9233 whether the set of proposed ring-fencing and corporate governance measures offered by FirstEnergy and the State in a proposed settlement would be sufficient.[7] OPC argued in that case that FirstEnergy's competitive nuclear generation business presented such a financial threat to Potomac Edison that the Commission should impose the "full ring-fencing suite" that the Commission imposed on Baltimore Gas and Electric ("BGE") just a year earlier to protect BGE from risks then associated with Constellation Energy Group ("CEG") and its nuclear fleet.[8] Despite the presence of FirstEnergy's non-regulated nuclear fleet, the Commission nevertheless found "good reasons" not to adopt the full ring-fencing suite OPC advocated for, and instead adopted the set of ring-fencing measures proposed in the settlement and enhanced further by the Commission,[9] explaining that:

> *First*, Potomac Edison is a multi-state utility company that combines restructures (in Maryland) and vertically integrated operations (in West Virginia). Any ring-fencing measures would need to be coordinated and approved by us, and by our counterparts in West Virginia. *Second*, and relatedly, we are concerned that isolating Potomac Edison's Maryland distribution operations with its West Virginia generation and distribution operations might make things *worse* for Maryland ratepayers if something goes wrong with the West Virginia operations. We are not convinced that total remoteness is unambiguously good for Potomac Edison's customers. *Third*, we agree with the Applicants that the post-Merger FirstEnergy is more diversified than Allegheny is now, and will build on a broader base of regulated operations than Allegheny currently has.[10]

The Commission's reasoning still applies today, particularly given that FirstEnergy no longer owns the competitive nuclear generation business that raised concerns in the FirstEnergy-Allegheny Energy merger proceeding. In late 2016, FirstEnergy announced plans to exit the competitive generation business. On March 31, 2018, FirstEnergy Solutions, the competitive

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[6] Case No. 9233, Order No. 83788 at 53 (Jan. 18, 2011).
[7] *Id*. at 54-55.
[8] *See id.* at 55; *see also* Case No. 9173, Order No. 82986 at 49-52 (detailing the full ring-fencing suite imposed on BGE).
[9] The Commission accepted the settling parties' proposal to impose ring-fencing and corporate governance measures regarding (i) separate regulated money pools, (ii) separate debt issuances, (iii) separate credit ratings, (iv) separate books and records, (v) separate capital structure, and (vi) no assumption by Potomac Edison of FirstEnergy debts. *Id*. at 56. The Commission enhanced the settling parties' proposed dividend restriction to its current form. *Id*. at 56-57.
[10] *Id*. at 55.

subsidiary of FirstEnergy, filed for Chapter 11 bankruptcy in order to facilitate an orderly financial restructuring, which would allow FirstEnergy Solutions to separate from FirstEnergy.[11] On February 27, 2020, FirstEnergy Solutions (now operating as "Energy Harbor"), emerged from bankruptcy, completing FirstEnergy's exit from the competitive generation business.[12] The ring-fencing measures put in place by the Commission in 2011 protected Potomac Edison during the FirstEnergy Solutions bankruptcy, and any additional ring-fencing measures are now even more unnecessary than at the time the Commission first rejected OPC's request in the FirstEnergy-Allegheny Energy merger given that substantially all of FirstEnergy's revenues come from its regulated business, and it is no longer in the competitive generation business.[13] This is also true because the other circumstances surrounding Potomac Edison in 2011 – regarding the multi-state nature of its operations, the concern over isolating Potomac Edison with regulated generation in West Virginia, and the mitigating presence of FirstEnergy's regulated businesses (which comprise substantially all of FirstEnergy's revenues) – continue to be relevant today, just as they were in Case No. 9233.

For each of these reasons, the Commission should deny OPC's Petition as it pertains to Potomac Edison's ring-fencing and corporate governance measures.

3. "A full accounting of all actions that either FirstEnergy or Potomac Edison have taken to protect Potomac Edison from any adverse impacts related to the [alleged] racketeering conspiracy, including impacts from the possible immediate acceleration of FirstEnergy's repayment obligation under the credit facilities."

Contrary to OPC's allegation at page 9 of the Petition, neither Potomac Edison nor FirstEnergy face a "liquidity crisis." To the contrary, both entities have strong cash positions and borrowing capabilities.

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[11] *See* Press Release: *FirstEnergy's Transformation to Fully Regulated Utility Company with Stronger Financials and Customer-Focused Growth Moves Ahead* (March 31, 2018), available at: https://investors.firstenergycorp.com/investor-materials/news-releases/news-details/2018/FirstEnergys-Transformation-to-Fully-Regulated-Utility-Company-with-Stronger-Financials-and-Customer-Focused-Growth-Moves-Ahead/default.aspx.

[12] *See* Press Release: *FirstEnergy Solutions Successfully Completes Financial Restructuring, Emerges as Energy Harbor* (Feb. 27, 2020), available at: https://energyharbor.com/en/about/news-and-information/firstenergy-solutions-successfully-completes-financial-restructu; FirstEnergy 2020 Annual Report at 11 ("Completed final step of FirstEnergy's strategy to exit the competitive generation business with FES Debtors' emergence from bankruptcy on February 27, 2020."). The only material generation assets that FirstEnergy currently owns are fully regulated assets owned by Monongahela Power Company, a vertically integrated utility, in West Virginia, and by Monongahela Power Company's wholly-owned subsidiary, Allegheny Generating Company, in Virginia.

[13] *Cf.* Case No. 9361, Order No. 86990 at 42-43 (May 15, 2015) (ordering creation and use of bankruptcy-remote special purpose entity for PHI's regulated-only businesses because "the existing ring fencing provisions must be expanded to ensure that no harm is realized by ratepayers through the acquisition of the PHI distribution utilities by a generation-owning parent utility").

FirstEnergy has moved decisively to maintain access to capital. On November 17, 2020, FirstEnergy and its regulated distribution subsidiaries, including Potomac Edison, entered into amendments to its revolving Credit Agreement dated as of December 6, 2016 (the "Credit Agreement"). Under the Credit Agreement, an aggregate amount of $2.5 billion is available to be borrowed, repaid and reborrowed (the "Revolving Facility"), subject to separate borrowing sublimits for each borrower, including Potomac Edison's $150 million borrowing sublimit. The amendment provides for modifications and/or waivers of (i) certain representations and warranties and (ii) certain affirmative and negative covenants, contained therein, which allowed the borrowers to maintain compliance with those provisions. In addition, among other things, the amendment reduces the sublimit applicable to FirstEnergy to $1.5 billion (previously it had been the entire Credit Facility); otherwise, the sublimit of each of the RCF Borrowers, including Potomac Edison, was unchanged.

On November 23, 2020, FirstEnergy and its regulated distribution subsidiaries, Jersey Central Power & Light ("JCP&L"), Met-Ed ("ME"), Penn Power ("PP"), Toledo Edison ("TE"), and West Penn Power ("WP"), borrowed $950 million in the aggregate under the Revolving Facility, bringing the outstanding principal balance under the Revolving Facility to $1.2 billion, with $1.3 billion of remaining availability under the Revolving Facility. These borrowings were incurred under the Revolving Facility as a proactive measure to increase the borrowers' respective cash positions and preserve financial flexibility for FirstEnergy and its subsidiaries. While the credit rating agencies took negative ratings action against FirstEnergy and its subsidiaries in the wake of the arrest and subsequent indictment of the now-former Ohio Speaker of the House, Larry Householder, and certain actions taken by FirstEnergy in response, S&P Global recognized "*the company's decision to significantly increase its borrowings under its revolving credit facility demonstrates prudent risk management given the unique challenges the company is facing*."[14]

Following successful access of the capital markets by its transmission holding company subsidiary, FirstEnergy repaid $250 million in short-term borrowings under the Credit Facility on March 23, 2021. As of April 19, 2021, FirstEnergy and its subsidiaries had over $1.5 billion of borrowing capacity under the Credit Facility[15]. In particular, Potomac Edison maintains strong liquidity; as of March 31, 2021, it had (i) $100 million of cash on hand[16], (ii) $150 million of borrowing capacity under the Revolving Facility, and (iii) continued access to the FirstEnergy Regulated Money Pool.

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[14] S&P downgrades FirstEnergy following $1.95B draw on revolving credit facility | S&P Global Market Intelligence (spglobal.com).
[15] FirstEnergy Corp. Form 10-Q, filed April 22, 2021.
[16] The Potomac Edison Company Unaudited Consolidated Financial Statements for the Three Months Ended March 31, 2021.

4. "Whether Potomac Edison bears any liability or obligation for the debt incurred under the FirstEnergy credit facilities, to which Potomac Edison is a party."

As set forth in Section 2.20 of the Credit Agreement:[17] "[e]ach Borrower's obligations [thereunder] are several and not joint. Any action taken by or on behalf of the Borrowers shall not result in one Borrower being held responsible for the actions, debts or liabilities of the other Borrowers." As such, while Potomac Edison is a party to the Credit Agreement, it would only be liable for borrowings it made under the Revolving Facility and is not liable for the repayment of outstanding borrowings by any other Borrowers, including FirstEnergy.

5. "A full accounting of all contingency plans FirstEnergy has in place (if any) in the event of breach of the credit facilities for non-compliance with anti-corruption laws."

Item 3 above describes in detail steps which FirstEnergy and its subsidiaries have taken to maintain their financial security, including the November 2020 amendment to the Credit Facility. It is true that the Credit Agreement has typical covenants with respect to anti-corruption laws. In the event there is a breach of such covenants in the Credit Agreement outside the scope of the current waiver, FirstEnergy would expect to need to seek another waiver from its bank group.

Additionally, a default under the Credit Agreement by any other borrower does not cross-default to Potomac Edison. In other words, should there be a default under Credit Agreement by FirstEnergy, Potomac Edison is not in default simply because FirstEnergy would be; thus Potomac Edison would be expected to maintain access to the Revolving Facility.

As noted above, as of April 19, 2021, FirstEnergy and its subsidiaries had over $1.5 billion of borrowing capacity under the Credit Facility and FirstEnergy, on a consolidated basis, had over $1.6 billion of cash on hand. In addition, Potomac Edison maintains strong liquidity; as of March 31, 2021, it had (i) $100 million of cash on hand[18], (ii) $150 million of borrowing capacity under the Revolving Facility, and (iii) access to the FirstEnergy Regulated Money Pool.

6. "Whether Potomac Edison is abiding by the dividend restrictions tied to investment grade ratings imposed under Commission Order No. 83788 and, if so, how the stoppage of dividend payments has affected FirstEnergy."

Potomac Edison's publicly available financial statements, together with publicly available ratings information, would show any dividends paid to FirstEnergy in violation of Order No. 83788. The last dividend Potomac Edison paid was in June 2019, when the Company was investment grade with all of the major credit agencies. (S&P lowered FirstEnergy and subsidiaries,

[17] A copy of the Credit Agreement is available at the following link: Credit Agreement (Dec. 6, 2016).
[18] *See supra* n.16.

including Potomac Edison, below investment grade more than a year later, on October 30, 2020.) Therefore, this "issue" is a complete non-issue.

As for what the impact on FirstEnergy is from Potomac Edison having not paid a dividend to it in the last two years, that is not a matter within the Commission's jurisdiction. Moreover, if the Commission had thought that the Company's stopping paying dividends to its corporate parent was a matter of concern to Maryland, the Commission would not have imposed the dividend-payment restriction in the first place.

7. "Whether the FirstEnergy scandal has impacted either FirstEnergy's or Potomac Edison's access to capital markets, including the impacts of the credit rating agency downgrades and the anticipated impact going forward."

Again, OPC's baseless speculation is directly contradicted by publicly available facts, which were disclosed in FirstEnergy's SEC filings prior to OPC's filing of its Petition. Since mid-March 2021, four separate FirstEnergy subsidiaries have successfully accessed the capital markets for $1.0 billion in the aggregate. As such, Potomac Edison would be expected to be able to successfully access the capital markets, if needed. However, the current finance plan does not have Potomac Edison issuing long-term debt in the capital markets through 2023. As Items 3 and 5 above already described in detail, Potomac Edison has strong, independent access to borrowing.

8. "Whether the FirstEnergy scandal has impacted the cost of funds accessed by Potomac Edison through the 'money pool' and the anticipated impact going forward."

As of May 31, 2021, Potomac Edison had approximately $4.3 million borrowed under the FirstEnergy Utility Money Pool (the "UMP"). Potomac Edison's position in the UMP from July 2020 through May 2021 fluctuated with an investment as high as approximately $100 million to a borrowed position as high as approximately $35 million. The UMP's rate during that period varied from a low of approximately 0.10% to a high of approximately 2.05%. The primary driver of the rate increase is the amount of outside borrowings being invested in the UMP (see the discussion in Item 3 regarding borrowings under the Credit Facility).[19] As discussed previously, FirstEnergy has a strong cash position.

[19] As per the UMP Agreement, if only internal funds of UMP participants comprise the daily outstanding balance of all loans outstanding during a calendar month, the interest rate applicable to such daily balances shall be the greater of the 30 day LIBOR rate as quoted in The Wall Street Journal or the money market rate that a lending participant could have obtained if it placed its excess cash in such an investment. Whereas, if only external funds of UMP participants comprise the daily outstanding balance of all loans outstanding during a calendar month, the interest rate applicable to such daily outstanding balance shall be the lending participant's cost for such external funds calculated monthly or, if more than one Party had made available external funds at any time during the month, the applicable interest rate shall be a composite rate, equal to the weighted average of the costs incurred by the respective parties for such external funds calculated monthly. In cases where the daily outstanding balances of all loans outstanding at any

9. "Whether, and to what extent, FirstEnergy's increased financing costs have impacted Potomac Edison's ability to execute its strategic plans and meet its expected capital needs."

FirstEnergy's and Potomac Edison's strong cash positions and access to credit have already been discussed in detail above. Potomac Edison fully expects to have adequate capital to execute its strategic plans.

Moreover, OPC's postulation of an "existential threat" to Potomac Edison from nuclear decommissioning liability is totally baseless.[20] Potomac Edison has neither been an owner nor operator of any nuclear power station. As such, Potomac Edison has no nuclear decommissioning obligations with respect to any nuclear power stations, including those formerly owned or operated by former FirstEnergy subsidiaries. Further, as of March 31, 2021, FirstEnergy has not recorded any loss contingency with respect to any nuclear decommissioning obligations of its former subsidiaries.

10. "Whether and to what extent FirstEnergy used funds collected from Potomac Edison's Maryland ratepayers for the lobbying and bribes allegedly undertaken by FirstEnergy in connection with Ohio House Bill 6."

As a precaution undertaken long before OPC filed its petition, FirstEnergy's Board of Directors conducted an independent internal investigation in light of the government investigations currently underway in Ohio. In connection with that internal investigation, FirstEnergy identified certain transactions, including vendor services, that were either improperly classified, misallocated, or lacked proper supporting documentation. In some cases, these transactions resulted in certain amounts being included in customer rates. Potomac Edison has identified less than $38,000 of such improperly classified or inadequately documented funds that were inadvertently reflected in distribution base rates as a result of the last base rate case. Potomac Edison intends to refund to customers in full all charges associated with these transactions that were reflected in distribution rates.

Because this amount of improperly classified or inadequately documented funds reflected in distribution rates is so small, it is not practical to reduce current distribution rates to remove those charges. Therefore, in February 2021 (well before the OPC Petition), Potomac Edison took a proactive approach by establishing a regulatory liability to ultimately refund to customers in full, and with carrying charges, such amounts that were reflected in customer distribution rates. The regulatory liability will consist of amounts reflected in distribution rates as of March 23, 2019 (*i.e.*,

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time during the month include both internal funds and external funds, the interest rate applicable to the daily outstanding balances for the month shall be equal to the weighted average.

[20] OPC Petition at 13-14.

the effective date of current distribution rates) through the date of new distribution rates established from the upcoming 2023 base rate case. The regulatory liability will be presented to the Commission in the 2023 base rate case and supported by testimony, thereby affording all parties their right and ability to review such amounts.

11. ***"Whether FirstEnergy used or is using any funds collected from Potomac Edison's Maryland ratepayers to fund the legal and other fees associated with FirstEnergy's defense of any action or lawsuit concerning the [alleged] racketeering conspiracy."***

This is another non-issue raised by OPC without any basis. No such use of Potomac Edison funds has been or is being made.

12. ***"Whether the Commission should order an audit of transactions between FirstEnergy and Potomac Edison to determine the extent to which Potomac Edison has been funding activities that involve or relate to the [alleged] racketeering conspiracy."***

For the reasons discussed in Items 10 and 11 above, no audit is warranted. The Commission's existing mechanisms, including the annual ring-fencing report and biannual CAM audit, also provide assurance that there is no basis for a special audit.

13. ***"A full accounting of all measures FirstEnergy has taken to address the governance problems and reporting control issues that the [alleged] racketeering conspiracy has exposed."***

While an inquiry into FirstEnergy's internal governance is beyond the scope of the Commission's jurisdiction, Potomac Edison notes, simply for informational purposes, that remedial activities taken by FirstEnergy's management and its Board of Directors include the following:

- the appointment of a new Chief Executive Officer to improve the "tone at the top";

- the termination of certain members of senior management, including FirstEnergy's former Chief Executive Officer, for violations of certain FirstEnergy policies and its internal code of business conduct;

- the separation of others, including the Vice President, Rates and Regulatory Affairs, and two senior members of the legal department, due to inaction and conduct that the Board of Directors determined was influenced by the improper tone at the top;

- the establishment of a subcommittee of FirstEnergy's Audit Committee, who, with the Board of Directors, is overseeing the assessment and implementation of potential changes (as appropriate) in FirstEnergy's compliance program;

- the appointment of a new Chief Legal Officer;

- the appointment of a new Vice Chairperson of the Board and Executive Director to help lead efforts to enhance the company's reputation with external stakeholders;

- the appointment of new independent directors to the Board;

- the appointment of a new Chief Ethics & Compliance Officer to oversee the ethics and compliance program and enhance the existing compliance structure and role;

- FirstEnergy's Board of Directors' reinforcement of and FirstEnergy's management's recommitment to the importance of setting appropriate tone at the top and the expectation to demonstrate the company's core values and behaviors which support an ethical and compliant culture, as well as adherence to internal control over financial reporting;

- incorporated compliance into performance goals and metrics;

- paused disbursements from the Political Action Committee;

- stopping all contributions to 501(c)(4) organizations and implementing processes and controls governing political participation activities; and

- increased communication and training of employees with respect to:

    - FirstEnergy's commitment to ethical standards and integrity of its business procedures,

    - compliance requirements,

    - FirstEnergy's internal code of business conduct and other FirstEnergy policies, and

    - availability of and the process for reporting suspected violations of law or FirstEnergy's code of business conduct.

FirstEnergy's management, under the oversight of its Board of Directors, has developed and is continuing to refine a comprehensive remediation plan, which includes defined responsibilities and measurable milestones to evaluate the progress of the remediation activities. FirstEnergy's management and its Board of Directors are monitoring the progress of these activities on an ongoing basis.

14. "Whether the Icahn agreement meets the statutory requirements for acquisitions of interest over an electric company under [Section] 6-105 of the Public Utilities Article."

OPC also argues that an investigative proceeding is necessary because a Director Appointment and Nomination Agreement (the "Agreement")[21] will permit the Icahn Group ("Icahn") to nominate Andrew Teno and Jesse Lynn (the "Icahn Designees") to the FirstEnergy Board of Directors, which OPC argues triggers the Commission's review under PUA Section 6-105. The addition of two directors to FirstEnergy's Board of Directors does not implicate Section 6-105.

Section 6-105 was enacted to address a gap in the Commission's review of "acquisitions" of a public service company in the State. The General Assembly found in Section 6-105(b)(i) that "existing legislation requires the approval by the Commission of the acquisition by one public service company of another public service company's stocks and obligations, but does not require the Commission's approval of these acquisitions by persons not engaged in the public utility business in the State." While Section 6-105 closed this gap, the General Assembly limited the scope of the law to "the *acquisition of* an electric company, gas and electric company, or a gas company that operates in Maryland."[22] Under Section 6-105(e)(1), a person must obtain "prior authorization from the Commission" only if "the acquisition" causes the person to "become an affiliate of the electric company" and thereby obtain "the power to exercise any substantial influence over the policies and actions of an electric company."

Section 6-105 therefore requires a two-step analysis to determine whether Commission approval is necessary. First, the transaction must involve the "acquisition" of an electric company (under § 6-105(c)) or an "affiliate" of an electric company (under § 6-105(e)). Second, if the acquisition only involves an affiliate of an electric company, Commission review is only necessary if it would result in a person gaining "substantial influence" (either directly or indirectly) over an electric company (under § 6-105(e)). Therefore, Section 6-105 contemplates that even an "acquisition" of an affiliate of a public service company would not fall under the purview of the law if it did not also result in obtaining the power to exercise substantial influence over the public service company.

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[21] A copy of the Director Appointment and Nomination Agreement ("Agreement") was attached to the letter to the Commission from Jeffrey Trout filed on March 31, 2021 (ML No. 234527).
[22] PUA § 6-105(c) (emphasis added).

a. The Agreement does not involve an acquisition of Potomac Edison or any affiliate of Potomac Edison.

OPC's petition to review the Agreement under Section 6-105 falters at the first step of the analysis because the Agreement does not involve the "acquisition" of Potomac Edison or any affiliate of Potomac Edison. Icahn was a FirstEnergy shareholder before the Company entered into the Agreement, and neither Icahn nor the Icahn Designees are acquiring any FirstEnergy or Potomac Edison assets in connection with the Agreement.[23] While OPC correctly notes that the Agreement forbids Icahn from acquiring more than 9.99% of FirstEnergy's common stock while an Icahn Designee is on the FirstEnergy Board of Directors, that is a restriction, not a required investment.[24] The Agreement thus does not involve the acquisition of Potomac Edison (or any affiliate of Potomac Edison), therefore it does not require the Commission's approval under Section 6-105.

The Agreement instead resolves a potential proxy contest among shareholders related to the composition of the FirstEnergy Board of Directors that falls outside of the Commission's regulatory authority, and should instead be left to private shareholders to resolve.[25] Requiring approval from the Commission for the addition of two board members here would set a troubling precedent and call into question whether Commission approval is required *every* time a parent company of a public service company in Maryland seeks to add a member or members to its board. Interpreting Section 6-105 in this way would violate "the familiar rule of statutory construction that a statute should not be construed in a way that would lead to absurd results, or consequences inconsistent with common sense." *Maryland Auto. Ins. Fund v. Sun Cab Co., Inc.*, 305 Md. 807, 813 (1986) (citations omitted).

b. Neither Icahn nor the Icahn Designees will acquire the power to exercise substantial influence over Potomac Edison as contemplated by Section 6-105.

Even if the Agreement could be construed as involving the acquisition of FirstEnergy (such that Icahn would become an affiliate of Potomac Edison), OPC's argument would nevertheless also falter at the second step of the Section 6-105 analysis. Section 6-105 does not define what constitutes "substantial influence," and only once has the Commission assessed the meaning of the term to require approval for a transaction: in the "EDF Transaction," which involved Electricité de France International, SA's ("EDF") acquisition of an interest in Constellation Energy Group's

[23] Agreement at ¶ 7.
[24] Agreement at ¶ 3(a)(i).
[25] *See* Agreement at ¶ 1(a)(v) ("The Icahn Group agrees not to conduct a proxy contest or engage in any solicitation of proxies, regarding any matter, including the election of directors, with respect to the 2021 Annual Meeting.").

("CEG") nuclear generation and operation business, thereby becoming an affiliate of Baltimore Gas and Electric Company ("BGE").[26]

OPC argues that the Agreement will grant Icahn and the Icahn Designees the ability to exercise "substantial influence" over the Company because they will serve on certain Board committees and because Icahn might acquire more FirstEnergy common shares than Icahn already owns, but no more than 9.99% of all FirstEnergy common shares.[27] The scope of this Agreement pales in comparison to the EDF Transaction.

In the EDF Transaction, EDF agreed to purchase a 50% interest in Constellation Energy Group's ("CEG") nuclear generation and operation business for $4.5 billion.[28] The acquisition involved the payment of $1 billion in cash in exchange for 10,000 shares of Series B Preferred Stock of CEG and an asset put option pursuant to which CEG, at its option, could sell certain of its non-nuclear generating assets to an EDF affiliate for up to $2 billion.[29] In addition, EDF was granted the right to appoint a member to the CEG Board of Directors, and, unlike Icahn, EDF was permitted to acquire *more than* 9.99% of CEG's common stock after a standstill period.[30] Lastly, EDF agreed to purchase up to $600 million of senior unsecured debt securities from CEG, pay any "Change in Control" employee incentive payments (up to $32 million), pay CEG $150 million to cover transaction costs, pay $36 million to the CEG Foundation, and pay $20 million for a new visitor center at Calvert Cliffs nuclear power plant.[31]

The Commission held that this extensive investment in, and acquisition of, CEG's generation business would result in EDF acquiring the power to exercise substantial influence over BGE. Because the term "substantial influence" is not defined by statute, the Commission interpreted the plain and ordinary meaning of the words. The Commission noted that "substantial influence is not the same thing as control," because a person "may be able to exercise substantial influence without possessing control in the corporate or securities law senses of the term."[32] However, to be "substantial," influence must have the "power to sway or affect based on prestige, wealth, ability or position."[33] Therefore, the Commission interpreted influence as "a continuum" that "runs from no influence on one end to total control on the other."[34]

In the EDF Transaction, the Commission was most concerned that EDF's hefty investment in CEG's generation business provided EDF the power to influence CEG's capital allocation

[26] *See* Case Nos. 9160 and 9173, Order No. 82407 (Jan. 16, 2019) (closing Case No. 9160).
[27] OPC Petition at 21-22.
[28] Case No. 9173, Order No. 82719 (June 11, 2009) at 8.
[29] *Id*.
[30] *Id*. at 8-9.
[31] *Id*. at 10.
[32] *Id*. at 20-21.
[33] *Id*. at 23 (quoting the definition of "substantial" from the American Heritage Dictionary).
[34] *Id*. at 21.

decisions. The Commission found that EDF's control over the nuclear subsidiary's ability to pay dividends to CEG would necessarily involve the ability to influence BGE due to the "financial interdependence" between CEG and BGE:

> [I]n the reality of the present-day CEG and BGE, we find that EDF's post-closing power to veto distributions from CENG could influence CEG's capital allocation decisions in a substantial way. A decision by EDF to block distributions from CENG could significantly affect the capital available to CEG. This, in turn, could alter the options available to CEG and BGE as they attempt to rebalance BGE's debt-equity ratio to preserve BGE's investment-grade credit rating and BGE's latitude to issue its own debt to cover its capital needs. If CEG is unable to infuse capital into BGE, then CEG and BGE may have to consider other alternatives to raise BGE's revenues, including a rate increase BGE otherwise might not have sought.[35]

The Commission also looked to EDF's ability to nominate a member of CEG's Board of Directors, but even in that instance, the Commission focused on the intertwined business relationship that EDF and CEG would have through EDF's investment in CEG's nuclear generating business:

> [I]t is not simply the presence of the EDF-nominated director on the CEG Board that creates the opportunity for influence, *but the particular circumstances of the post-closing relationship CEG and EDF will have formed*. EDF's director will almost certainly possess more knowledge and experience bearing on CEG's future nuclear expansion, and thus CEG's predominant future business priority, than all or nearly all of the other members of the CEG Board. . . . Accordingly, the EDF nominee to the CEG Board is likely to be far more influential than one Board seat might suggest numerically.[36]

As a result, the Commission found that "EDF's veto power over decisions by CENG to authorize dividends to CEG alone qualifies as the power to exercise substantial influence," and that "EDF's power to nominate a director to CEG's Board of Directors – a director who could serve on or even lead influential committees – compounds EDF's post-closing influence in a very real and substantial way, especially as CEG's nuclear joint ventures compete with BGE for scarce capital resources."[37]

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[35] *Id*. at 30.

[36] *Id.* at 31-32 (emphasis added).

[37] *Id*. at 24.

Here, there is no extensive business investment in a non-utility affiliate that would cause the types of influence and competition for capital that the Commission was concerned with in the EDF Transaction. The addition of two members to FirstEnergy's Board—raising the total number of members from 12 to 14—will not alter the Board's power structure in such a way that permits the Icahn Designees to exercise substantial influence like EDF could. The Icahn Designees have only two votes (when they gain the approval to vote, per the Agreement)[38] out of 14—a small minority of the total votes on the Board.[39] Neither Icahn nor the Icahn Designees have any "veto power" over a FirstEnergy affiliate's dividend decisions like EDF did, nor are Icahn or the Icahn Designees acquiring any financial interest in a FirstEnergy affiliate that would cause the type of influence that EDF could wield. In fact, while OPC expresses concern over "the uncertainty surrounding FirstEnergy's governance," the Icahn Designees are bound by the same fiduciary duties as any other director and must act in the best interests of FirstEnergy and its shareholders in discharging their board responsibilities.[40] To that end, OPC's purported "concerns" surrounding Mr. Icahn—who is already an investor in the Company—are speculative and unjustified.

Lastly, Section 6-105(e)(2) is instructive here. That provision, which the Company acknowledges only applies to "gas and electric companies," provides that a person may *not* be considered to have acquired the power to exercise any substantial influence if the person (i) owns or controls less than 20% of the outstanding voting interest or (ii) does not have the right to designate more than 20% of the board of directors. PUA § 6-105(e)(2). Even though this provision does not specifically apply to FirstEnergy as an electric company, it suggests that the General Assembly contemplated that a transaction that *solely* involves less than 20% of *any* public service company's board of directors seats would not require Commission approval. Under the Agreement, the Icahn Designees will only occupy 14% of the Company's Board of Directors.

For each of these reasons, the Commission should deny OPC's petition to review the Agreement under Section 6-105.

15. "Any and all appropriate relief for Potomac Edison and its customers based on the outcome of the Commission's investigation of the above issues."

No such actions are required – see the discussions in Items 1-14 above.

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[38] *See* Agreement at ¶ 1(a)(iii) ("Until such time as all Regulatory Approvals … are obtained, no Icahn Designee (or Replacement Designee) serving as a member of the Board shall have the right to vote at any meeting of the Board or on any Board Committees.").

[39] OPC also focuses on the fact that the Icahn Designees may sit on committees. *See* OPC Petition at 21. But these committees only make recommendations to the Board; they do not decide matters for the Board (and, again, the Icahn Designees will only have one vote on any given committee).

[40] Agreement at ¶ 1(a)(ii).

II. Conclusion

One of the many aphorisms attributed to Sir Winston Churchill is the admonition to "never let a good crisis go to waste." OPC appears to have embraced that saying, using FirstEnergy's legal difficulties in Ohio as an excuse to ask the Commission to launch investigations in more than a dozen different directions. The fatal flaw in OPC's position, however, is that Potomac Edison – the entity regulated by the Commission – is ***not*** in crisis. Far from it; as discussed in detail above, Potomac Edison remains on a firm financial footing and continues to provide safe and reliable service to its customers in Maryland. Accordingly, OPC's Petition should be denied.

Respectfully submitted,

J. Joseph Curran, III
Christopher S. Gunderson
Susan R. Schipper
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202

Jeffrey P. Trout
The Potomac Edison Company
10802 Bower Avenue
Williamsport, MD 21795

Attorneys for The Potomac Edison Company

Cc: Jason M. Stanek, Chairman, Maryland Public Service Commission
Michael T. Richard, Commissioner, Maryland Public Service Commission
Anthony J. O'Donnell, Commissioner, Maryland Public Service Commission
Odogwu Obi Linton, Commissioner, Maryland Public Service Commission
Mindy L. Herman, Commissioner, Maryland Public Service Commission
David S. Lapp, People's Counsel, Maryland Office of People's Counsel
Leslie M. Romine, Office of Staff Counsel, Maryland Public Service Commission