

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Jersey Central Power & Light	Docket Nos. ER10-1451-006
Ohio Edison Company	ER10-1467-007
The Toledo Edison Company	ER10-1468-007
The Cleveland Electric Illuminating Company	ER10-1469-007
Pennsylvania Power Company	ER10-1473-006
Metropolitan Edison Company	ER10-1474-006
Pennsylvania Electric Company	ER10-1478-008
Monongahela Power Company	ER10-2687-006
The Potomac Edison Company	ER10-2688-009
West Penn Power Company	ER10-2689-009
Green Valley Hydro, LLC	ER10-2728-008
Allegheny Energy Supply Company, LLC	ER12-273-002
	[Not Consolidated]

**Motion to Intervene and Protest of Public Citizen, Inc. and  
Citizens Utility Board of Ohio**

On July 29, 2022, twelve subsidiaries of FirstEnergy Corp. gave notice under Section 205 of the Federal Power Act of the transaction that provides Stephen A. Schwarzman-controlled Blackstone Inc. a seat on its board of directors in exchange for an equity investment of roughly 5% of FirstEnergy’s voting shares. The Schwarzman/Blackstone transaction came just months after Carl C. Icahn’s investment group secured two board seats of its own in exchange for an even smaller investment of roughly 3.5% of FirstEnergy’s voting securities. As a result, Blackstone’s Sean T. Klimczak occupies a seat on FirstEnergy’s board of directors, as do Icahn’s Jesse A. Lynn and Andrew Teno.<sup>1</sup> Mr. Klimczak is Mr. Schwarzman’s subordinate, and Messrs. Lynn and Teno are Mr. Icahn’s employees. Now two activist-investor billionaires—Mr. Schwarzman and Mr. Icahn—control 25% of FirstEnergy’s board of directors.

One of the Commission’s tests to determine affiliation is whether an investor secures representation “on the board through the appointment of the investor’s own officers or directors.”<sup>2</sup>

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<sup>1</sup> [www.firstenergycorp.com/investor/corporate\\_governance/board\\_of\\_directors.html](http://www.firstenergycorp.com/investor/corporate_governance/board_of_directors.html)

<sup>2</sup> February 18, 2021 *Order Denying Complaint*, Public Citizen, Inc. v. CenterPoint Energy, Inc., Docket No. EL21-2, at 33.

The separate agreements with Mr. Schwarzman's Blackstone and Mr. Icahn granting their employees seats on FirstEnergy's board of directors provides the two billionaires with the ability to substantially influence FirstEnergy's management, and conveys access to material, non-public information of FirstEnergy's operations, including the utility's subsidiaries with market-based rate authority. Therefore, Mr. Schwarzman's Blackstone and Icahn Enterprises must be deemed to be affiliated with FirstEnergy, per 18 CFR § 35.36 (a)(9)(iii), in order to protect FirstEnergy's captive customers and to ensure just and reasonable rates.

## **Motion to Intervene**

Established in 1971, Public Citizen is a national, not-for-profit, non-partisan, research and advocacy organization representing the interests of household consumers. Public Citizen is active before FERC promoting just and reasonable rates, and supporting efforts for utilities to be accountable to the public interest. Our interests in this proceeding are unique, and cannot be represented by any other party. Financial details about our organization are on our web site.<sup>3</sup>

The Citizens Utility Board of Ohio (CUB-OH) is a nonprofit, nonpartisan consumer watchdog that advocates for residential and small business utility customers. Our mission is to educate consumers to reduce their utility bills today as well as to work long-term for energy that is affordable, reliable, and clean. Our membership lives across the state of Ohio. CUB-OH routinely advocates for consumer interests before the Public Utilities Commission of Ohio in rate cases and other dockets. Our web site has additional information.<sup>4</sup>

## **Background**

FirstEnergy Corp is one of America's largest utilities, serving 13.5 million people through its ten operating utilities across six U.S. states. Some FirstEnergy utilities operate as a monopoly franchise with hundreds of thousands of captive ratepayers.

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<sup>3</sup> [www.citizen.org/about/annual-report/](http://www.citizen.org/about/annual-report/)

<sup>4</sup> [www.cuboh.org](http://www.cuboh.org)

Blackstone Inc. is a private equity and hedge fund behemoth, with \$941 billion total assets under management, with affiliates (through Lightstone Generation) that have been granted market-based rate authority. Blackstone, Inc. is controlled by its co-founder and CEO, Stephen A. Schwarzman,<sup>5</sup> through his holdings of Series preferred stock that vastly dilute powers of Blackstone's common stockholders and provides him authority to control Blackstone's board of directors, among many other powers.<sup>6</sup>

Icahn Enterprises LP is a holding company conglomerate, with 88% of the corporation owned and controlled by Carl C. Icahn<sup>7</sup>, the legendary billionaire "corporate raider".<sup>8</sup>

As a result of recent transactions approved by the Commission, Messrs. Schwarzman and Icahn, through their affiliated financial entities, now control 25% of FirstEnergy's board of directors.<sup>9</sup>

Despite owning just 3.5% of FirstEnergy's voting securities, Mr. Icahn now has control over 16.7% of FirstEnergy's twelve board seats, and Mr. Schwarzman's subordinate represents 8.3% of FirstEnergy's board. Both Mr. Schwarzman and Mr. Icahn are notorious activist investors, who seek to leverage their equity investments to influence target companies. Control over FirstEnergy's board of directors not only provides them with power over the utility, but also provides them with access to material, non-public information about FirstEnergy's operations, including its affiliates that have been granted market-based rate authority.

The April 21, 2022 Commission order approving the Blackstone transaction noted "that while we make no finding regarding affiliation between the Icahn Group and Blackstone in this proceeding, doing so does not preclude the possibility of the Commission finding affiliation between the parties in the future."<sup>10</sup> Public Citizen and CUB-OH are therefore seeking the Commission to now, in these Section 205

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<sup>5</sup> See footnote 18, May 2, 2022 *Notice of Non-Material Change in Status*, FERC Docket Nos. ER17-256-014, ER17-242-013, ER17-243-013 and ER17-245-013.

<sup>6</sup> [www.sec.gov/ix?doc=/Archives/edgar/data/1393818/000119312522054433/d299999d10k.htm](http://www.sec.gov/ix?doc=/Archives/edgar/data/1393818/000119312522054433/d299999d10k.htm)

<sup>7</sup> [www.sec.gov/ix?doc=/Archives/edgar/data/813762/000155837022002150/tmb-20211231x10k.htm](http://www.sec.gov/ix?doc=/Archives/edgar/data/813762/000155837022002150/tmb-20211231x10k.htm)

<sup>8</sup> See, as an example, Ken Auletta's *The Raid*, [www.newyorker.com/magazine/2006/03/20/the-raid](http://www.newyorker.com/magazine/2006/03/20/the-raid)

<sup>9</sup> See Docket Nos. EC21-77 and EC22-27.

<sup>10</sup> *Order Authorizing Disposition of Jurisdictional Facilities*, Docket No. EC22-27, at 51.

proceedings, determine affiliation between FirstEnergy and the two activist investors—Mr. Schwarzman’s Blackstone and Icahn.

## Protest

### **A. Federal Regulations require Blackstone & Icahn Enterprises to be deemed affiliated with FirstEnergy**

18 CFR § 35.36(a)(9)(v) creates a “rebuttable presumption of lack of control” for any person or class of persons owning less than 10% of the outstanding voting securities of a company. In this case, it appears as though both Mr. Schwarzman’s Blackstone and Icahn Enterprises each own less than 10% of FirstEnergy’s voting securities.<sup>11</sup>

But Icahn Enterprises directly controls 16.7% of FirstEnergy’s board of directors. Icahn’s control over more than 10% of FirstEnergy’s board provides enough evidence to rebut the presumption that its 3.5% of FirstEnergy’s voting shares results in a lack of control. And Mr. Schwarzman’s Blackstone controls one seat on FirstEnergy’s board of directors. FERC has previously determined that such control of board seats is enough to determine that the investor has control over the public utility: “The Commission has expressed concern with structures where the investor itself would be represented on the board through the appointment of the investor’s own officers or directors . . . in order to support a finding of control.”<sup>12</sup>

Furthermore, 18 CFR § 35.36 (a)(9)(iii) states that any person or class of persons with a lack of arm’s length dealing with a specific company can be treated as an affiliate. The presence of Blackstone and Icahn Group executives on FirstEnergy’s board of directors provides them with access to material, non-public information of its operations. Because Blackstone owns significant generation assets—through its Lightstone Generation affiliate—that overlap with FirstEnergy’s, its active role on

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<sup>11</sup> In calculating Blackstone and Icahn’s control of voting securities, the Commission should consider inclusion of their use of derivatives—such as total return swaps or funded equity collars—that activist investors frequently utilize to amplify their financial influence over a public company in excess of actual stock ownership. Use of such derivative instruments by activist investors is widespread, and a successful means of exerting economic influence over a target company’s management without the hassle of regulatory compliance.

<sup>12</sup> See February 18, 2021 *Order Denying Complaint*, Public Citizen, Inc. v. CenterPoint Energy, Inc., Docket No. EL21-2, at 33; and *Entegra Power Grp. LLC*, 125 FERC ¶ 61,143, at PP 33, 40 (2008), *order on clarification and reh’g denied*, 129 FERC ¶ 61,156 (2009).

FirstEnergy's board of directors threaten just and reasonable rates. Therefore, the Commission must deem both Blackstone and Icahn Group to be affiliates of FirstEnergy per 18 CFR § 35.36 (a)(9)(iii).

**B. Consumers face the consequences of Blackstone & Icahn Enterprises' evasion of affiliate status**

Access to material, nonpublic information is coveted by investors, and its possession bestows leverage and power for the party able to access it. The Federal Trade Commission warned FERC that investors can leverage privileged information as a means to control companies and engage in anti-competitive behavior: "Even a non-controlling partial acquisition by a private-equity firm of a competitor to a portfolio company that the private equity firm already owns in whole or in part can lead to anticompetitive effects if it . . . facilitates the exchange of competitively sensitive information . . . This concern can arise even in situations where the private equity firm does not own a controlling interest".<sup>13</sup>

In this case, Blackstone exhibits a form of control over FirstEnergy by virtue of its executive serving on the board of directors, and its access to material, non-public information of FirstEnergy's threatens just and reasonable rates because of its ownership of significant generation units in FirstEnergy's markets.

Icahn Enterprises occupying 16.7% of the seats on FirstEnergy's board of directors rebuts the presumption that its ownership of 3.5% of the utility's voting securities results in a lack of control. To protect FirstEnergy's captive customers from potential abuse, the Commission must determine Icahn Enterprises to be affiliated with FirstEnergy.

**Conclusion**

One of the Commission's tests to determine affiliation is whether an investor secures representation "on the board through the appointment of the investor's own officers or directors."<sup>14</sup> In the case of Mr. Schwarzman's Blackstone and Icahn Enterprises, both activist investors have secured their officers on FirstEnergy's board of

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<sup>13</sup> FERC Docket No. PLO9-3, at pages 6-7 and 13, filed April 29, 2009.

<sup>14</sup> February 18, 2021 *Order Denying Complaint*, Public Citizen, Inc. v. CenterPoint Energy, Inc., Docket No. EL21-2, at 33.

directors. Combined, the two companies comprise 25% of FirstEnergy's board, with Icahn's two employees representing 16.7%. Their representation on FirstEnergy's board of directors provides the activist investors' access to material, non-public information on FirstEnergy's business, including its affiliates with market-based rate authority. This presents challenges to just and reasonable rates, especially given Blackstone's market-based rate authority affiliates that operate within FirstEnergy's markets. The Commission must determine that Mr. Schwarzman's Blackstone and Icahn Enterprises are affiliates of FirstEnergy Corp., per 18 CFR § 35.36 (a)(9)(iii).

Respectfully submitted,

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