UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

FirstEnergy Corp. Docket No. EC21-77

**Joint Protest of Public Citizen and Citizens Utility Board of Ohio**

On April 13, FirstEnergy Corp. applied under Section 203 of the Federal Power Act to allow entities controlled by Carl C. Icahn to have two employees as voting representatives on FirstEnergy’s board of directors.[[1]](#footnote-1) We seek a formal Commission determination that Mr. Icahn’s investment in FirstEnergy Corp. constitutes “control” for the purposes of the Commission’s regulations; that Mr. Icahn’s companies be deemed affiliates of FirstEnergy Corp; and that the Commission consider setting the issue for hearing of whether the transaction impairs effective state regulation since it appears no state utility regulator has asserted jurisdiction over the proposed transaction.

**About Public Citizen and Citizens Utility Board of Ohio**

Established in 1971, Public Citizen is a national, not-for-profit, non-partisan, research and advocacy organization representing the interests of household consumers. We are active before FERC promoting just and reasonable rates, and supporting efforts for utilities to be accountable to the public interest. Our financial details are located at our web site.[[2]](#footnote-2)

The Citizens Utility Board of Ohio (CUB Ohio) is a new consumer organization working on behalf of residential and small business utility customers. We are a nonpartisan nonprofit with members across the state, and we work for cheaper bills, reliable service, transparency, consumer rights, and clean, healthy energy.

**Joint Protest**

The FirstEnergy Corp. Application seeks permission to allow “two members of FirstEnergy’s Board of Directors recently appointed by the Icahn Group” to “receive voting rights with respect to their positions on the FirstEnergy Board.”[[3]](#footnote-3) The Application states that the Icahn Group is ultimately controlled by Carl C. Icahn.[[4]](#footnote-4) The Application states that “the Icahn Group currently holds, and will continue to hold, less than 10% of the outstanding voting securities of FirstEnergy.”[[5]](#footnote-5) In fact, it appears affiliates of Mr. Icahn own only about 3.5% of FirstEnergy’s shares.[[6]](#footnote-6)

Importantly, the Application appears to request the Commission to approve the proposed transaction allowing Mr. Icahn’s two representatives to FirstEnergy’s board of directors to be able to vote without formally deeming the Icahn Group to have “control” of FirstEnergy or be deemed a legal affiliate of FirstEnergy:

*Given the uncertainty in Commission precedent as to whether these circumstances constitute “control” for purposes of Section 203 of the FPA, the Applicants respectfully request out of an abundance of caution that the Commission assume,* ***without deciding****, that it has jurisdiction and authorize the Proposed Transaction.* [emphasis added][[7]](#footnote-7)

Contrary to the assertion by FirstEnergy Corp., there is no “uncertainty” about whether the Commission can determine that the Icahn Group has “control” of FirstEnergy Corp. Commission regulations at 18 CFR § 35.36(a)(9)(iii) are clear.

18 CFR § 35.36 (a)(9)(v) states that any entity “owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.” Affiliates of Carl C. Icahn not only own less than 10%, but rather their holdings of FirstEnergy stock appear to be closer to 3.5% of outstanding shares.

Despite owning only about 3.5% of FirstEnergy’s stock, Mr. Icahn is able to wield enough influence with FirstEnergy’s board and management to successfully install two new board members.

18 CFR § 35.36(a)(9)(iii) states that “Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm’s-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate.” It is clear that the ability of Mr. Icahn’s affiliates to obtain two voting representatives on FirstEnergy’s board of directors constitutes clear control and Mr. Icahn and his companies must be deemed to be affiliates.

In addition, we challenge the claim made in the Application that Icahn’s two board designees “shall in no event be deemed to constitute the exercise of ***substantial*** influence or control over FirstEnergy or any of its subsidiaries.” [emphasis added][[8]](#footnote-8) This is contradicted by public reports. Last month, the *Wall Street Journal* reported that “Mr. Icahn took a stake in FirstEnergy with an eye toward pushing it to quickly settle litigation related to the” company’s criminal bribery scandal, and that “two employees of the billionaire activist’s firm, Jesse Lynn and Andrew Teno, will join FirstEnergy’s board and serve on committees focused on helping the company improve its compliance and settle litigation.[[9]](#footnote-9) Just days ago, FirstEnergy announced that it was close to a deal to settle litigation related to the criminal bribery probe.[[10]](#footnote-10) Icahn’s interactions with FirstEnergy’s management are clearly resulting in “substantial influence” and “control over FirstEnergy”.

Finally, Commission regulations stipulate that, “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.”[[11]](#footnote-11) The Application is silent on whether the transaction is subject to review and approval by any of the five state utility regulators with jurisdiction over FirstEnergy’s franchised utilities (Maryland, New Jersey, Ohio, Pennsylvania and West Virginia). For example, Ohio Code appears to suggest that the Public Utilities Commission of Ohio (PUCO) is limited to only reviewing transactions involving entities that own 20% or more of a jurisdictional utility[[12]](#footnote-12)—and Icahn’s affiliates appear to own only 3.5%. As a result, there is no current proceeding in Ohio to review the transaction. We have additionally confirmed that none of the other four states have current or planned proceedings underway to review the proposed transaction.

We ask that Applicants confirm that there are no current or planned state regulatory reviews of the proposed transaction, and that Applicants have not requested any state regulator to review the proposed transaction. 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.

Respectfully submitted,

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1. Application, at pages 1-2. [↑](#footnote-ref-1)
2. [www.citizen.org/about/annual-report/](http://www.citizen.org/about/annual-report/) [↑](#footnote-ref-2)
3. Application, at pages 1-2. [↑](#footnote-ref-3)
4. Application, at page 5. [↑](#footnote-ref-4)
5. Application, at page 2. [↑](#footnote-ref-5)
6. Jim Mackinnon, “Icahn's FirstEnergy directors now shareholders in Akron utility,” *Akron Beacon Journal*, March 26, 2021, www.beaconjournal.com/story/business/2021/03/26/new-icahn-directors-now-shareholders-akrons-firstenergy-corp/7011810002/ [↑](#footnote-ref-6)
7. Application, at page 2. [↑](#footnote-ref-7)
8. Application, at page 7. [↑](#footnote-ref-8)
9. Cara Lombardo, “Icahn Reaches Deal With Utility,” March 17, 2021, www.wsj.com/articles/firstenergy-nears-deal-to-give-carl-icahn-two-board-seats-11615914013 [↑](#footnote-ref-9)
10. Andrew J. Tobias, “FirstEnergy says it’s talking to feds about cutting deal in HB6 bribery probe,” April 22, 2021, www.cleveland.com/business/2021/04/firstenergy-says-its-talking-to-feds-about-cutting-deal-in-hb6-bribery-probe.html [↑](#footnote-ref-10)
11. 18 CFR § 2.26(e)(2). [↑](#footnote-ref-11)
12. Ohio Revised Code 4905.402(A)(1). [↑](#footnote-ref-12)