

ORDER NO. 89888

Petition of The Maryland Office of
People’s Counsel to Investigate the
Future of First Energy’s Relationship
with Potomac Edison in Light of
Recent Events

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9667

Issue Date: July 26, 2021

ORDER GRANTING, IN PART, PETITION REQUESTING INVESTIGATION

1. On May 11, 2021, the Maryland Office of People’s Counsel (“OPC”) petitioned the Commission to open an investigation into the future relationship between FirstEnergy Corp. (“FirstEnergy”) and The Potomac Edison Company (“Potomac Edison”).¹ This Petition arose out of a series of reported scandals involving alleged activities by FirstEnergy executives in the state of Ohio.

2. OPC set forth in detail the progress of several investigations into these potentially illegal activities, which have so far resulted in federal criminal charges, many civil and regulatory proceedings in multiple states, as well as the termination of certain of FirstEnergy’s executives, including its chief executive officer. A brief summary of the facts is provided below.

A. Background

3. On October 29, 2020, FirstEnergy filed a Form 8-K with the U.S. Securities and Exchange Commission, stating that an independent review committee had terminated FirstEnergy’s CEO as well as other individuals for conduct inconsistent with the

¹ OPC Petition for First Energy Investigation, May 11, 2021, Maillog No. 235219.

company's code of conduct. This misconduct included a payment of \$4 million related to the termination of a consulting agreement, the counter-party to which was suspected to be the then-acting chairman of the Public Utilities Commission of Ohio. This payment allegedly purchased services unrelated to the consulting agreement.

4. FirstEnergy transferred approximately \$60 million to an IRS 501(c)(4) entity named Generation Now, Inc. This entity was allegedly created to benefit Ohio House Speaker Larry Householder. Allegedly in return for these funds, Mr. Householder introduced Ohio House Bill 6, which supported two FirstEnergy nuclear plants in Ohio – the Perry and Davis-Besse plants – thereby saving FirstEnergy the need to address the rapidly increasing decommission costs associated with these facilities. Following passage of HB 6, a monthly charge paid by Ohio ratepayers funded the costs to retain these plants as working generators.

5. Although the specific cause remains unclear, an approximately concurrent liquidity crisis caused FirstEnergy to borrow \$2 billion through two separate credit facilities. The terms of those facilities permit the creditors to call a \$2.2 billion payment in the event of a violation by FirstEnergy of any anti-bribery or anti-corruption statutes. OPC asks the Commission to investigate whether the possibility that such a demand by creditors, brought about by FirstEnergy's suspect financial position regarding its nuclear facilities, has so eroded the relationship between FirstEnergy and Potomac Edison as to warrant divestiture of the subsidiary from the parent company.

6. These scandals have caused Standard & Poor's to further downgrade FirstEnergy's credit rating below investment grade - from BB+ to BB. Because Potomac Edison, as a wholly-owned subsidiary, lacks access to the equity markets, the cost of its

access to FirstEnergy’s money pools is tied to FirstEnergy’s credit rating. Additionally, its ability to issue its own debt is related to its own credit rating, which OPC claims may yet be further downgraded as a result of these scandals.

B. Ring-Fencing, the Icahn Agreement and OPC’s Request

7. When the Commission approved FirstEnergy’s acquisition of Potomac Edison in 2011, it imposed several ring-fencing measures to protect Potomac Edison and its ratepayers from any harmful effects that might result from any financial difficulties incurred by its new parent company.² Condition 18 of Order No. 83788 prohibits Potomac Edison from issuing a dividend without Commission approval should any major credit agency downgrade its credit ratings below investment grade. OPC petitions the Commission to investigate whether Potomac Edison has complied with this Condition as well as the overall sufficiency of the ring-fencing measures imposed in 2011.

8. OPC also discusses changes to FirstEnergy’s Board of Directors and whether such changes trigger the need for Commission review pursuant to *Annotated Code of Maryland*, Public Utilities Article (“PUA”) § 6-105. Specifically, OPC is concerned with an agreement between FirstEnergy and the Icahn Group, headed by Carl Icahn. This “Icahn Agreement” increases the number of members of FirstEnergy’s board of directors from 12 to 14, with the Icahn Group appointing the two additional directors.

9. Potomac Edison filed the Icahn Agreement with the Commission on March 31, 2021, expressing its belief that the agreement did not require Commission approval

² Case No, 9333, *In the Matter of the Application of the Merger of FirstEnergy Corp. and Allegheny Energy, Inc.*, Order No. 83788 (Jan. 18, 2011).

because the agreement expressly prohibited Icahn from exercising substantial influence over Potomac Edison.³

10. OPC's Petition notes that Icahn holds 3.5% of FirstEnergy's shares, and the Icahn Agreement permits him to purchase up to 9.999% of shares. Additionally, OPC points to Icahn's history as a "corporate raider" to contend that this agreement at least might increase his influence to the level of "substantial" as set forth in PUA § 6-105.

11. Based upon the above, OPC requests that the Commission open an investigation into 14 separate issues:

- (1) Whether the Commission should order the divestiture of Potomac Edison from FirstEnergy;
- (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;
- (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 racketeering conspiracy, including impacts from the possible immediate acceleration of FirstEnergy's repayment obligation under the credit facilities;
- (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;
- (5) A full accounting of all contingency plans FirstEnergy has in place (if any) in the event of a breach of the credit facilities for noncompliance with anti-corruption laws;
- (6) Whether Potomac Edison is abiding by the dividend restrictions tied to investment grade ratings imposed under Commission Order No. 83788;
- (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;

³ On July 15, 2021, the Federal Energy Regulatory Commission approved the Icahn Agreement as in the public interest.

- (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;
- (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;
- (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;
- (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 racketeering conspiracy;
- (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 racketeering conspiracy;
- (13) A full accounting of all measures FirstEnergy has taken to address the governance problems and reporting control issues that the racketeering conspiracy has exposed;
- (14) Whether the Icahn Agreement meets the statutory requirements for acquisitions of interest over an electric company under § 6-105 of the Public Utilities Article.

C. Potomac Edison Response

12. On June 9, 2021, Potomac Edison responded to the Petition and, with the partial exception of Issue No. 10, urged the Commission to reject OPC’s request for an investigation.

13. Generally, Potomac Edison: (1) objected to whether the Commission has jurisdiction to investigate actions of FirstEnergy, an Ohio company; and (2) assured the Commission that the conduct by FirstEnergy has not affected Potomac Edison’s financial

status, which it says remains solid. Potomac Edison acknowledged that “less than \$38,000” of Maryland rate payer funds did go to First Energy that were “improperly classified or inadequately documented,” and states that they will be returned to ratepayers as part of the next base rate case.⁴ As a result, Potomac Edison claims that it has not and need not take additional measures as a result of the scandals identified in the Petition.

14. On June 25, 2021, OPC replied to Potomac Edison, in general contending that the requested investigation is necessary to verify Potomac Edison’s claims of financial stability.⁵ Additionally, OPC expressed concern that Potomac Edison did not share its opinion of the severity of the issues it raises.

Commission Decision

15. The Commission concludes that many of OPC’s issues regarding FirstEnergy’s financial status are either outside the Commission’s jurisdiction or too attenuated to Potomac Edison’s ratepayers to warrant an investigation. Although the potential criminal conduct by FirstEnergy executives is significant, many of the financial issues identified by OPC are unrelated to that scandal, but instead reflect earlier business decisions.

16. On the issue of Potomac Edison’s potential future issuance of dividends to its parent company while possessing a below-investment grade rating, the Commission states that the conditions to the FirstEnergy/Potomac Edison Merger Order reflect a Commission directive. Both Potomac Edison and FirstEnergy shall continue to adhere to this directive.

⁴ Potomac Edison Letter dated June 9, 2021, p. 9.

⁵ OPC Response Letter dated June 15, 2021, Maillog No. 235743.

17. Although the Commission agrees with OPC that it possesses the authority to order the divestiture of a Maryland utility from a parent company, the Commission does not find the present circumstances warrant an investigation into that ultimate remedy at this time. Should FirstEnergy intend to sell Potomac Edison in the future, that transaction will require Commission approval pursuant to PUA § 6-105, and the Commission will ensure that any change of ownership is in the interest of Maryland ratepayers.

18. However, the Commission finds that an investigation is warranted into certain issues that either impact Potomac Edison directly, or have a non-minimal likelihood of impacting Potomac Edison.⁶ The Commission therefore will partially grant OPC's Petition and open a separate case to investigate certain issues, somewhat narrowed by the Commission. Upon issuance of this Order, parties may conduct discovery of Potomac Edison for no longer than four (4) months regarding:

- a. The extent that any results of the scandal have affected, or might in the future affect, Potomac Edison's cost to access funds from FirstEnergy's "money pool";
- b. Whether and to what extent FirstEnergy used, is using, or intends to use any funds from Potomac Edison to pay for the bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy;
- c. The extent to which the "Icahn Agreement" may potentially cause the Icahn-appointed directors to exercise "substantial influence" over Potomac Edison as set forth in PUA § 6-105.

⁶ The Commission clearly has jurisdiction over Potomac Edison's use of Maryland ratepayer funds and the cost of credit for Potomac Edison. PUA 6-101; 4-102; 4-103(b). Additionally, in approving the merger of Potomac Edison and FirstEnergy, the Commission expressly retained jurisdiction over both applicants to enforce the provisions of the Merger Order.

19. The Commission will conduct a status conference at a future date to assess the results of discovery and whether additional procedural steps are warranted, including the filing of written testimony, a hearing schedule and any post-hearing briefing.

20. Any third-party that wishes to intervene in these proceedings shall do so within twenty (21) days of the date of this Order.

IT IS THEREFORE, this 26th day of July, in the year of Two Thousand Twenty-One, by the Public Service Commission of Maryland;

ORDERED: (1) That the Maryland Office of People’s Counsel’s Petition to Investigate is granted, in part, as described above;

(2) That the Commission hereby docket Case No. 9667;

(3) That petitions to intervene by any interested party shall be filed by August 16, 2021 with the Commission’s Executive Secretary; and

(4) That parties may conduct discovery of Potomac Edison for no longer than four months as described in this order.

/s/ Jason M. Stanek _____

/s/ Michael T. Richard _____

/s/ Anthony J. O’Donnell _____

/s/ Odogwu Obi Linton _____

/s/ Mindy L. Herman _____

Commissioners