

ORDER NO. 89990

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: November 18, 2021

PROPOSED ORDER OF COMMISSIONER LINTON¹

1. On July 26, 2021, the Commission granted a petition by the Maryland Office of People’s Counsel (“OPC”) to initiate an investigation into the relationship between FirstEnergy Corp. (“FirstEnergy”) and The Potomac Edison Company (“Potomac Edison”) subsequent to several scandals that occurred in the state of Ohio. In granting OPC’s petition, the Commission authorized discovery into three subject areas: (1) the effect these scandals may have had on Potomac Edison’s cost to access FirstEnergy’s ‘money pool’; (2) whether and to what extent FirstEnergy may have used any funds from Potomac Edison to pay for any costs associated with FirstEnergy’s misconduct; and (3) the extent to which the “Icahn Agreement” may cause Icahn-appointed directors to exercise “substantial influence” over Potomac Edison pursuant to *Annotated Code of Maryland*, Public Utilities Article (“PUA”) § 6-105.

¹ On October 22, 2021, the Commission delegated OPC’s motion to compel to Commissioner Odogwu Obi Linton for hearing. Maillog No. 237539.

2. On October 15, 2021, OPC filed a motion to compel discovery regarding Potomac Edison's responses to six questions contained within its Data Request ("DR") Set No. 1. On November 1, 2021, Potomac Edison submitted its response to OPC's motion, and a hearing on these pleadings was conducted on November 4, 2021. At the hearing, each of OPC's six questions was addressed numerically and rulings were issued after hearing argument from both parties on each issue. This Proposed Order encapsulates that ruling.

OPC Data Request 1-1

3. In DR 1-1, OPC seeks all documents in Potomac Edison's possession upon which it relied to calculate the \$38,000.00, which Potomac Edison concedes was wrongly included in Potomac Edison's base rates. Potomac Edison referenced this amount in its initial response to OPC's petition, and OPC contends that it is entitled to any documents relevant to whatever internal investigation occurred in order to generate this information.

4. In response, Potomac Edison argued that it had provided the names of all individuals involved in the analysis, including all spreadsheets that showed how it calculated the \$38,000.00 amount. Subsequently, in an effort to resolve this discovery dispute, Potomac Edison provided all cost allocations between FirstEnergy and Potomac Edison between 2017 and 2020. At the November 4, 2021 hearing, I asked Potomac Edison whether Potomac Edison possesses any additional documents that are responsive to either of the four parts of OPC DR 1-1, and Potomac Edison responded that there were not.²

² Tr. at 31-33 ("There is nothing else that Potomac Edison has - - did in order to determine the \$38,000.00 number").

5. OPC's motion to compel regarding the information contained in DR 1-1 is granted. To the extent no additional documents exist in Potomac Edison's possession, that may be the complete response to this order. If not, Potomac Edison is ordered to provide all responsive documents that it currently possesses or comes to possess during the course of this proceeding.

OPC DR 1-2

6. In DR 1-2, OPC requests all documentation regarding the internal investigation conducted by FirstEnergy shortly after its misconduct had come to light. Potomac Edison referenced this internal investigation in its initial response to OPC's petition, in which it states that this investigation "identified certain transactions, including vendor services, that were either improperly classified, misallocated, or lacked proper supporting documentation."³ DR 1-2 seeks to learn: (1) whether the results of this investigation were reduced to writing; (2) whether Potomac Edison was involved in this investigation; (3) whether the investigation involved the strengthening of ring-fencing measures; and (4) whether the investigation found any wrongdoing by personnel of Potomac Edison.

7. OPC argues that it is entitled to this information because Potomac Edison directly (or at least indirectly) relied upon this investigation to encourage the Commission not to open these proceedings by referencing and summarizing the findings of FirstEnergy's own investigation. OPC contends that Potomac Edison cannot use the requested content of the investigation both as a sword and a shield. OPC further contends that Potomac Edison waived any attorney-client privilege that may have existed when it referred to the general conclusions of the investigation.

³ Potomac Edison Response to Petition at 9.

8. Potomac Edison responds that FirstEnergy's General Counsel, as well as a group of members of the Board of Directors for FirstEnergy, conducted the investigation of misconduct in Ohio. Potomac Edison cannot waive the attorney-client privilege between FirstEnergy and its general counsel. Further, Potomac Edison does not possess any documentation from this investigation, and a party cannot require discovery of documents over which another entity has no control. Citing *Steele Software Sys Corp. v. DataQuick Info. Sys., Inc.* 237 F.R.D. 561, 565 (D. Md. 2006), Potomac Edison contends that a corporate relationship between two entities does not produce the level of control required to respond to discovery.

9. Potomac Edison further argues that the Commission's order, opening discovery of these issues explicitly limited discovery to Potomac Edison and only Potomac Edison. Finally, Potomac Edison argues that it never placed this investigation at issue by referencing it in its initial response because its existence was public information contained in FirstEnergy's SEC filings.

10. In response to questions from the bench, Potomac Edison confirmed that it did not participate in FirstEnergy's investigation and does not know any more about the findings of that investigation than it has already stated. Essentially, Potomac Edison contends that OPC seeks information regarding salacious activities that occurred outside of the Commission's jurisdiction and are entirely disconnected from Potomac Edison or its ratepayers.

11. During discussions at the November 4 hearing, the parties distinguished between two separate investigations or at least two separate aspects of the same investigation. The first was conducted by Mr. Ray Valdez and involved an analysis of the cost allocations

between FirstEnergy and Potomac Edison. Although Mr. Valdez is a FirstEnergy employee, this investigation only sought facts related to Potomac Edison (as discussed previously regarding DR 1-1). Separate from this Potomac Edison-centered review, FirstEnergy corporate counsel supervised an investigation into the misconduct in Ohio. Regarding this second investigation, Potomac Edison contacted FirstEnergy to ascertain whether FirstEnergy's investigation touched upon Potomac Edison in any way and learned that it did not.⁴

12. OPC responded that this entire case concerns the conduct of FirstEnergy, and other discovery responses provided by Potomac Edison were sponsored by employees of FirstEnergy.

13. OPC's motion to compel Potomac Edison's response to OPC DR-1-2 in this case is granted. Although it is unclear whether the internal investigation by FirstEnergy was an entirely separate investigation than the investigation by Mr. Valdez (which determined that \$38,000.00 had been misallocated to Potomac Edison ratepayers), I find that the two investigations were sufficiently intertwined that OPC is entitled to the full context of Mr. Valdez' ultimate conclusions.

14. I further conclude that Potomac Edison has waived any attorney-client privilege by describing the contents of the investigation, and FirstEnergy has also done so by speaking to Potomac Edison regarding whether FirstEnergy's internal investigation involved information related to Potomac Edison. OPC is entitled to verify whether these representations are accurate.

⁴ OPC contends that this inquiry also waived any attorney-client privilege that may otherwise apply to documents generated by FirstEnergy.

15. Regarding the issue of control, I conclude that Potomac Edison has practical control over these documents.⁵ The parent company in this case is the subject of the investigation that has given rise to this discovery. Potomac Edison and FirstEnergy regularly exchange corporate documents during the ordinary course of business, and FirstEnergy has participated in the discovery process in Maryland through the provision of requested information by FirstEnergy employees.⁶ Finally, Potomac Edison possesses and has cited what appears to be at least a portion of FirstEnergy’s overall investigation.

Data Request 1-10

16. In DR 1-10, OPC seeks “all communications, including drafts or proposed language, exchanged between or among FirstEnergy (including its agents and representatives) and Mr. Carl Icahn or the Icahn Signatories (including their agents and representatives) concerning the Icahn Agreement)”. OPC claims these documents involve the execution of a contract, not privileged settlement negotiations. Additionally, transaction-related documents may demonstrate that the Icahn directors will wield more power than what is set forth within the four corners of the Icahn Agreement.

17. OPC further argues that the Commission had possession of the Icahn Agreement at the time it issued the Order that opened these proceedings. If the Commission intended to limit discovery to the terms contained within the four corners of that agreement, no discovery would have been necessary or possible.

⁵ *Goodman v. Praxair Servs. Corp.* 632 F.Supp.2d 494, 515 (D. Md. 2009) (Discovery includes not only information that the party owns, but also information that the party “has the right, authority, or practical ability to obtain...from a non-party”).

⁶ OPC Motion at 6, n. 22.

18. Potomac Edison responds by citing Federal Rule of Evidence (“FRE”) 408, which protects statements made by parties during the course of settlement negotiations. The obvious purpose is to encourage parties to settle without fear of negative repercussions should they concede any issue during the course of negotiations. Potomac Edison also relies upon a ruling by the Commission, which prohibited discovery by a third-party of settlement discussions between Exelon and Constellation Energy.⁷ Additionally, Potomac Edison contends that both parties to the Icahn Agreement are outside the Commission’s jurisdiction.

19. OPC responds by distinguishing the Commission’s ruling in the Exelon-Constellation merger from the Commission’s ruling in Case No. 9173, in which the Commission ordered parties to “produce documents ... memorializing the transaction.”⁸ OPC also references PUA § 6-105(f)(6), which requires the Commission to consider “all documents relating to the transaction giving rise to the application.”

20. Potomac Edison responds that the Icahn Agreement *was* a settlement agreement, specifically an agreement that settled a shareholder dispute between FirstEnergy and one of its largest shareholders. As such, requiring disclosure of any discussions surrounding the Icahn Agreement would have a chilling effect on settlement as contemplated by FRE 408. Additionally, PUA § 6-105(f)(6) is inoperative because the provisions of section 6-105(f) only apply after the submission of an application to the Commission for approval under that statute. No such application is pending before the Commission. In response to this data request, Potomac Edison states that it did provide all corporate governance

⁷ *Re Merger of Exelon Corp. and Constellation Energy Group*, Case No. 9271, at 58-62 (P.S.C. Jan. 4, 2012).

⁸ Case No. 9173, Order No. 82407 at 2.

documents, including bylaws, related to FirstEnergy to allow OPC to analyze the Icahn Agreement in the larger context of FirstEnergy's internal governing procedures.

21. In response to questions from the bench, Potomac Edison stated that the provision that asserts that the Icahn Agreement will not create "substantial influence" over FirstEnergy's subsidiaries likely applied to all subsidiaries, despite using language identical to Maryland's statute. Both parties acknowledge that other states have statutory language very similar to PUA § 6-105, even if not identically worded.

22. OPC's motion to compel Potomac Edison's response to DR 1-10 is granted in part and denied in part. Potomac Edison shall supplement its response to DR 1-10 only as to documents that relate to Potomac Edison and are in Potomac Edison's possession. Additionally, if OPC wishes to revise its data request and limit its request only to documents related to the provisions of the Icahn Agreement that discuss future substantial influence, it may do so. However, as currently phrased, DR 1-10 is overly broad and to that extent OPC's motion is denied.

Data Request 1-22

23. This data request seeks all FirstEnergy board or committee notes, agendas or reports since the execution of the Icahn Agreement. OPC states that it wishes to ascertain whether and how the Icahn directors have been exercising influence over Potomac Edison since they assumed their new roles. OPC observes that this case is unusual compared to prior cases under section 6-105 in that the directors have had an opportunity to exercise substantial influence prior to any Commission analysis. Subsequent to its initial data request, OPC limited its request to any board materials related to Potomac Edison or Maryland.

24. In response, Potomac Edison informed OPC that no such documents exist as far as Potomac Edison is aware. Counsel for Potomac Edison confirmed that statement during the hearing.⁹

25. Based upon Potomac Edison's representations and the fact that the Icahn directors have yet to exercise any of their rights under the agreement (except perhaps attending board meetings), I conclude there is nothing to order Potomac Edison to provide. Should Potomac Edison, during the course of this proceeding, possess any documents that are related to board discussions involving Potomac Edison or Maryland before the end of discovery, those materials shall be provided to OPC.

Data Request 1-24

26. This data request seeks "all reports, including audits, whether conducted by or for FE or PE (or any other FE operating company) that addresses, concerns or relates to bribes, lobbying costs, legal fees or other costs associated with the misconduct by FirstEnergy." Prior to the hearing, OPC limited this request to documents that relate to Potomac Edison or Maryland. In response to this limitation, Potomac Edison stated that no responsive documents exist. Nonetheless, as discussed in the consideration of DR 1-1, Potomac Edison did augment their response by providing all cost allocations between FirstEnergy and Potomac Edison from 2017 and 2020.

27. With regard to OPC DR 1-24, Potomac Edison shall provide all responsive documents related only to Potomac Edison that it possesses or may come to possess

⁹ Pursuant to the Icahn Agreement, the Icahn directors' rights under the agreement do not begin until FirstEnergy receives all regulatory approvals.

before the end of this proceeding. Potomac Edison has asserted that no such documents exist. If so, no additional documents need be provided pursuant to this order.

Data Request 1-40

28. This data request seeks “a complete accounting of all internal personnel costs and all outside legal and consulting costs incurred by FE or its subsidiary utilities in responding to (including internal investigations of) the HB6 scandal and Ohio consultancy scandal subsequent to the issuance of the federal Householder indictment on July 21, 2020 and FE’s November 19, 2020 SEC Form 10-Q report of the improper consultancy payments.” Although Potomac Edison has indicated they have provided all documents related to the allocation of costs from FirstEnergy to Potomac Edison, OPC claims that it requires this additional information in order to verify those allocations.

29. Potomac Edison responded that 100% of legal costs associated with FirstEnergy’s misconduct have been allocated to FirstEnergy. Potomac Edison informed OPC of this fact in response to a different data request (DR 1-5).

30. The motion to compel Potomac Edison’s response to OPC DR 1-40 is granted, limited to any costs actually allocated to Potomac Edison, as opposed to all costs incurred by FirstEnergy. Once again, Potomac Edison asserts that no additional responsive information exists, and if that is true, that answer complies with this order. As with prior orders, Potomac Edison shall supplement its response should it come into possession of responsive information during this proceeding.

IT IS THEREFORE, this 18th day of November, in the year Two Thousand Twenty-One by the Public Service Commission of Maryland,

31. It is therefore Ordered that OPC's motion to compel is granted and denied as described above. Any party wishing to appeal this Proposed Order must do so within seven days of the date of this Order. Should neither party file an appeal, this Order will become final eight days from the date of this Order.

IT IS THEREFORE, this 18th day of November, in the year Two Thousand Twenty-One by the Public Service Commission of Maryland,

ORDERED: (1) That OPC's motion to compel is granted and denied as described above; and

(2) That any party wishing to appeal this Proposed Order must do so with their memorandum on appeal within seven days of the date of this Order. Any response would be due within seven days thereafter; and

(3) Should neither party file an appeal, this Order will become final eight days from the date of this Order.

/s/ Odogwu Obi Linton

Commissioner