

**ORDER NO. 90033**

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

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CASE NO. 9667

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**Issue Date: January 6, 2022**

**ORDER ON APPEAL**

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” or “the Company”) following allegations and subsequent findings of misconduct related to lobbying activities that occurred in the state of Ohio. In granting OPC’s petition, the Commission authorized discovery into three subject areas: (1) the effect this misconduct 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.

A. OPC Motion to Compel

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 Commissioner Odogwu Obi Linton conducted a hearing on these pleadings on November 4, 2021. At the hearing, Commissioner Linton addressed each of OPC's six questions sequentially and issued a ruling from the bench after hearing arguments from both parties on each issue.

3. In DR 1-2, OPC requests all documentation regarding the internal investigation (the "Investigation Report") 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 stated that this investigation "identified certain transactions, including vendor services, that were either improperly classified, misallocated, or lacked proper supporting documentation."<sup>1</sup> DR 1-2 seeks production of the Investigation Report 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.

4. OPC argues that it is entitled to this information because Potomac Edison directly (or at least indirectly) relied upon the existence of this investigation to encourage the Commission not to open these proceedings. OPC contends that Potomac Edison cannot

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<sup>1</sup> Potomac Edison Reply to Petition at 9.

use the Investigation Report both as a sword and a shield. OPC further contends that Potomac Edison's limited disclosures regarding the Investigation Report sufficed to waive any attorney-client privilege that may otherwise attach.

B. Potomac Edison Response

5. Potomac Edison responds that FirstEnergy's outside counsel, in cooperation with its General Counsel and certain members of the Board of Directors, conducted the investigation of misconduct in Ohio. Potomac Edison contends it cannot waive the attorney-client privilege between FirstEnergy and its counsel. Further, Potomac Edison argues it does not possess any documentation from this investigation, and a party cannot require discovery of documents over which an 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 alone does not produce the level of control required to support a motion to compel.

6. Potomac Edison further argues that the Commission's initial order opened discovery of these issues only as they may relate to Potomac Edison. FirstEnergy is not the subject of this proceeding and is not subject to the Commission's jurisdiction. Finally, Potomac Edison argues that the existence of FirstEnergy's internal investigation was public information at the time the Company replied to OPC's Petition and that referring to public information cannot waive attorney-client privilege. Potomac Edison asserts that it did not participate in FirstEnergy's investigation and knows no more about the contents of the Investigation Report than OPC.

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

Edison. OPC maintains that Potomac Edison continues to use the Investigation Report as a sword and a shield, employing its existence to prevent these proceedings while simultaneously refusing to provide it in discovery.

8. In an attempt to resolve this discovery dispute informally, counsel for Potomac Edison contacted FirstEnergy to confirm that the Investigation Report did not involve Maryland or the Company. FirstEnergy confirmed that it did not.<sup>2</sup>

C. November 4 Hearing and Proposed Order

9. Based upon the pleadings and arguments by counsel during the November 4, hearing, Commissioner Linton concluded that FirstEnergy appeared to have conducted two intertwined investigations – one conducted by outside counsel into the misconduct in Ohio and one conducted by Raymond Valdes, the Director of Rates and Regulatory Affairs in Maryland and West Virginia for FirstEnergy Service Company (“FESC”). This second investigation, which might more accurately be described as an audit, analyzed the vendor cost allocations between FirstEnergy and Potomac Edison (as well as FirstEnergy’s other utility subsidiaries).

10. On November 18, 2021, Commissioner Linton issued his Proposed Order, encapsulating his rulings during the November 4, 2021 hearing. Commissioner Linton's ruling regarding OPC's DR 1-2 is now the primary matter of dispute before the Commission.

11. In his Proposed Order, Commissioner Linton granted OPC's motion to compel, concluding that First Energy's "two investigations were sufficiently intertwined that OPC

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<sup>2</sup> The record does not identify the FirstEnergy employee who made this confirmation.

is entitled to the full context of Mr. Valdes' ultimate conclusions. I further conclude that Potomac Edison has waived any attorney-client privilege by describing the contents of the investigation, and First Energy has also done so by speaking to Potomac Edison regarding whether FirstEnergy's internal investigation involved information related to Potomac Edison."<sup>3</sup>

12. Commissioner Linton also concluded that Potomac Edison had "practical control" over the Investigation Report. He concluded that "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."<sup>4</sup>

13. On November 29, 2021, Potomac Edison filed an appeal from the Proposed Order to the Commission *en banc*. In its supporting memorandum of law, Potomac Edison repeated and expanded upon its arguments before Commissioner Linton.<sup>5</sup> On December

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<sup>3</sup> Proposed Order at 5. Commissioner Linton's conclusions on the issues of: (1) whether Potomac Edison can waive the privilege of FirstEnergy and; (2) whether Potomac Edison has sufficient control over the Investigation Report such that the report may properly be the subject of discovery are somewhat inter-related. Presumably, if Potomac Edison were sufficiently tied to FirstEnergy regarding the subject of this proceeding as to be able to waive attorney-client privilege on its behalf, the Company would also possess practical control over any documents FirstEnergy possesses. As discussed below, the Commission concludes that Potomac Edison lacks the ability to waive any attorney-client privilege held by FirstEnergy, and FirstEnergy has not waived its own privilege by speaking with the Company. Despite whatever other business records are regularly exchanged between the Company and FirstEnergy, both entities have maintained a clear division between them on the subject of the Investigation Report, and Potomac Edison likely could not produce this report even if ordered to do so. The Commission will limit this decision to its conclusion that no party waived any attorney-client privilege during the course of these proceedings. The Commission notes that its conclusions would not change even if Potomac Edison's outside counsel had conducted its own internal investigation.

<sup>4</sup> Proposed Order at 5-6.

<sup>5</sup> In its memorandum of law, Potomac Edison raises the question of whether Commissioner Linton's Proposed Order violates FirstEnergy's due process rights. Potomac Edison likely lacks standing to raise a due process argument on behalf of FirstEnergy, and the Commission will therefore not address this issue.

6, 2021, OPC responded to Potomac Edison's memorandum. The Commission will address the substance of the arguments in these memoranda in the context of its decision.<sup>6</sup>

### **Commission Decision**

14. As it relates to OPC DR 1-2, the Commission reverses the Proposed Order and denies OPC's motion to compel the information requested therein. The Commission finds that the internal investigation conducted by FirstEnergy's outside counsel constituted attorney-client privilege, and no party disputes this premise.<sup>7</sup> The issue on appeal is whether this privilege was waived by certain factual disclosures by either the Company or FirstEnergy. Those three disclosures are (1) Potomac Edison's inclusion of the Investigation Report's existence in its initial contention that Maryland proceedings are unnecessary,<sup>8</sup> (2) Mr. Valdes' separate analysis into possible improper rate impacts on the Company's ratepayers, and (3) the conversation between Potomac Edison and FirstEnergy through which the Company confirmed for OPC that the Investigation Report did not involve Maryland or Potomac Edison. The Commission reverses the Proposed Order and concludes that none of these disclosures waived the attorney-client privilege between FirstEnergy and its outside counsel in Ohio.

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<sup>6</sup> On December 9, 2021, Potomac requested leave to file a reply to OPC. On December 10, 2021, OPC objected to this request. Because Commissioner Linton did not provide for any replies on appeal, and Potomac Edison's reply repeats the same arguments contained within its original memorandum, the Commission will grant OPC's request and disregard Potomac Edison's reply.

<sup>7</sup> *In re Smith and Nephew*, 2019 U.S. Dist. LEXIS 91795, at \*30-31 (Because "courts recognize that organizations' internal investigations may often serve more than one purpose, the privilege will apply so long as one of the significant purposes of the internal investigation was to obtain or provide legal advice."; *In re Allen*, 106 F.3d at 601 n. 9 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390-391 (1981) ("The very retention of outside counsel to perform an internal investigation indicates that [a party] wanted someone who could collect and sift through the facts with an eye to the legally relevant.")).

<sup>8</sup> The Company contends that its reference to the investigation contained in FirstEnergy's Form 10-K was not intended to forestall additional Maryland proceedings. The Commission concludes that this issue is irrelevant. Regardless of its intent, the Company did not disclose any information protected by attorney-client privilege.

15. First, the public filings by FirstEnergy with the U.S. Securities and Exchange Commission (“SEC”) describe its outside counsel’s internal investigation at a general level, and Potomac Edison described this investigation equally generally.<sup>9</sup> The public SEC filing stated that:

[I]n connection with the internal investigation, FirstEnergy recently identified certain transactions, which, in some instances, extended back ten years or more, including vendor services, that were either improperly classified, misallocated to certain of the Utilities and Transmission Companies, or lacked proper supporting documentation. These transactions resulted in amounts collected from customers that were immaterial to FirstEnergy, and the Utilities and Transmission Companies will be working with the appropriate regulatory agencies to address these amounts.

16. In its response to OPC’s petition to initiate Maryland proceedings, Potomac Edison stated that:

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.<sup>10</sup>

17. This language is almost identical, and the Commission concludes that Potomac Edison did not affect any asserted attorney-client privilege by bringing its existence to the Commission’s attention, especially since the purpose of doing so was to inform the Commission that the results of Mr. Valdes’ audit will be addressed in a future rate case.

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<sup>9</sup> FirstEnergy Annual Report, Form 10-K (February 2, 2021) (“the SEC Filing”). This report also references the subpoenas received from Ohio’s Attorney General. No party contends that this reference waives FirstEnergy’s attorney-client privilege regarding the proper response to these subpoenas.

<sup>10</sup> Reply to Petition at 9.

18. FirstEnergy has not disclosed any of its counsel’s legal conclusions or advice either in this proceeding or any of the ongoing proceedings outside of Maryland. To the contrary, the Public Utilities Commission of Ohio, following an *in camera* review of the Investigation Report, concluded that it contained privileged attorney-client communications and that “the Investigation Report is clearly prepared in reasonable anticipation of litigation. Therefore, the Investigation Report is protected from disclosure by both attorney-client privilege and the attorney work-product doctrine.”<sup>11</sup>

19. Because FirstEnergy has not provided the Investigation Report to Potomac Edison, the Company has repeatedly stated that it could not waive FirstEnergy’s privilege even if it wished to do so. The Commission agrees with this repeated argument by Potomac Edison. The record contains no evidence that Potomac Edison is any more aware of the contents of this investigation than OPC.

20. Second, the Commission concludes that the investigation by Mr. Valdes, an apparent offshoot of the full investigation by FirstEnergy in Ohio, is also inadequate to waive any attorney-client privilege. As noted, FirstEnergy described this cost allocation analysis in its Form 10K filed with the SEC. Ms. Eileen Mikkelson, a former employee of both FirstEnergy and FESC, provided Mr. Valdes with a list of certain vendor accounts to verify the accuracy of the allocation of funds among its subsidiary utilities.<sup>12</sup> Based upon his analysis of the documents provided, Mr. Valdes determined that Maryland’s

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<sup>11</sup> Ohio PUC, Case No. 17-974-EL-UNC (October 12, 2021) at para. 20. Potomac Edison Memorandum at Exhibit A.

<sup>12</sup> Potomac Edison has provided these documents to OPC.



distribution rates included approximately \$38,000 that lacked proper documentation or classification.<sup>13</sup>

21. The Commission agrees with Commissioner Linton's finding that OPC is entitled to any documentation upon which Mr. Valdes relied in reaching this amount. However, Potomac Edison has stated that it has already provided all such documentation in response to different OPC data requests.<sup>14</sup> In fact, Potomac Edison provided all cost allocations from FirstEnergy to Potomac Edison from 2017-2020.<sup>15</sup> Based upon the record, this utility audit involved no legal opinions or advice from FirstEnergy and appears to be an entirely accounting-based analysis. The vendor costs attributed to Potomac Edison are facts, and FirstEnergy and the Company could have conducted a similar audit at any time. The Commission concludes that Potomac Edison has provided OPC with all documentation relevant to this audit, and these documents do not waive any privilege.

22. Finally, OPC contends that both Potomac Edison and FirstEnergy waived the asserted privilege by disclosing that the Investigation Report did not involve Maryland or Potomac Edison. Following discussions between the OPC and the Company, Potomac Edison agreed to inquire from FirstEnergy as to whether the Investigation Report referenced Maryland in any way. This inquiry was intended to resolve this discovery dispute.

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<sup>13</sup> The Commission will address this error in Potomac Edison's next rate case.

<sup>14</sup> Potomac Edison responses to OPC DR 1-1 and DR 4-7

<sup>15</sup> Response to Motion to Compel at 5.

23. The parties disagree as to the nature of the agreement between them,<sup>16</sup> but there is no dispute that the Company contacted FirstEnergy in a good-faith effort to resolve this dispute. The Commission encourages parties to resolve their discovery disputes informally to the extent possible, and interpreting a waiver as broadly as OPC urges would significantly undermine that goal.

24. Generally stating the subject matter about which an attorney and client communicated does not waive the privilege. When a party asserts the attorney-client privilege in responding to a data request, that party has already informed the opposing party that the privileged communication involves the subject of the data request. In the present case, the Company simply told OPC what was not in the Investigation Report. OPC wishes to verify the absence of any reference to Maryland or the Company, but the Commission will not assume that either FirstEnergy or Potomac Edison is misrepresenting its contents. Finally, this conversation between the Company and FirstEnergy did not include the disclosure of any legal advice or opinions. The record establishes that FirstEnergy has steadfastly protected the attorney-client communications in its Investigation Report such that neither the Company, OPC nor any other outside entity is aware of its results.

#### D. Conclusion

25. Based upon the above, the Commission concludes that the Investigation Report is protected by attorney-client privilege and that no party has waived that privilege.

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<sup>16</sup> OPC contends that it promised to waive any remaining objections only if the Company's inquiry of FirstEnergy resulted in additional information from Potomac Edison in response to DR 1-2. Potomac Edison contends that it inquired of FirstEnergy with the understanding that if FirstEnergy confirmed that the Investigation Report contained no Maryland or Company-related information, the discovery dispute would be over.

Therefore, the Commission reverses the Proposed Order and denies OPC's motion to compel production of the Investigation Report as requested in DR 1-2.

26. On November 23, 2021, OPC separately moved to extend the discovery deadline in light of the subject motion to compel. Because the Commission has denied OPC's request for the Investigation Report, the Commission denies OPC's requested extension. The Commission will schedule a future status conference to address the appropriate proceedings going forward.

**IT IS THEREFORE** this 6<sup>th</sup> day of January, Two Thousand and Twenty-Two by the Public Service Commission of Maryland,

**ORDERED:** (1) That Commissioner Linton's grant of OPC's Motion to Compel regarding Data Request 1-2 is hereby reversed;

(2) That Commissioner Linton's Proposed Order is affirmed in all other respects; and

(3) That the Commission will schedule a status conference to address the appropriate proceedings going forward.

*/s/ Jason M. Stanek*  
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*/s/ Anthony J. O'Donnell*  
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*/s/ Mindy L. Herman*  
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Commissioners<sup>17</sup>

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<sup>17</sup> Commissioner Richard dissents from this Order and would affirm the Proposed Order. A dissenting statement is appended to this Order.

**Dissenting Statement of Commissioner Michael T. Richard**

I support Commissioner Linton’s rulings in favor of OPC’s request for information found in the FirstEnergy “Investigation Report;” therefore, I respectfully dissent from this decision.

Potomac Edison’s parent company, FirstEnergy, engaged in criminal and corrupt behavior that I believe undermines customer confidence in the utility’s performance and whether its rates are just and reasonable. The existence of the Investigation Report is part of the public record, and Potomac Edison has used the report in several instances to argue against OPC’s petition for this Commission to initiate an investigation into the misconduct by FirstEnergy. In my view, this information should be made available to OPC as it attempts to investigate this matter on behalf of Maryland customers.

FirstEnergy and Potomac Edison’s attempts to derail the Maryland utility ratepayer advocate’s efforts to shed light on the FirstEnergy scandal runs contrary to FirstEnergy’s public relations campaign in which it claims to be “intently focused on fostering a strong culture of compliance and ethics” and promising cooperation, openness, and *doing the right thing*.<sup>1</sup>

For these reasons, I believe that the Commission should have upheld Commissioner Linton’s ruling and supported the OPC's attempt to thoroughly investigate this matter.

*/s/ Michael T. Richard*  
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Commissioner

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<sup>1</sup> First Energy, “FirstEnergy Reaches Agreement to Resolve Department of Justice Investigation,” (July 22, 2021) at <[https://www.firstenergycorp.com/newsroom/news\\_articles/firstenergy-reaches-agreement-to-resolve-department-of-justice-i.html](https://www.firstenergycorp.com/newsroom/news_articles/firstenergy-reaches-agreement-to-resolve-department-of-justice-i.html)>. Potomac Edison and FirstEnergy are both subject to the Commission’s jurisdiction. *See, Re FirstEnergy Corporation*, Case No. 9233 (Order No. 83788) 102 MD P.S.C. 11 (2011) at 40. Therefore, the activities of FirstEnergy should not be shielded from review by the Commission, as the denial of OPC’s request for this information allows.