ORDER NO. 90615

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	* * * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 9667

Issue Date: May 5, 2023

ORDER ON INVESTIGATION

I. INTRODUCTION

1. On May 11, 2021, the Maryland Office of People's Counsel ("OPC") filed with the Public Service Commission (the "Commission") a Petition to Investigate the Future of First Energy's Relationship with Potomac Edison in light of Recent Events ("the Petition").[1]

2. The Commission granted OPC's Petition, in part, on July 26, 2021.[2] Thereafter, the Commission received comments from interested parties and conducted proceedings on the matter.

3. For the reasons discussed below, the Commission concludes that insufficient evidence exists to establish that Potomac Edison's customers have been harmed by FirstEnergy's misconduct in Ohio beyond those issues already acknowledged by the Company. As a result, the Commission concludes that no basis exists to continue this investigation.

[1] Maillog No. 235219.
[2] Order No. 89888 (Maillog No. 236265).

II. BACKGROUND

4. FirstEnergy is the parent owner of The Potomac Edison Company ("Potomac Edison" or the "Company") - an electric distribution utility serving customers in western Maryland and is subject to the Commission's regulatory authority.[3]

5. OPC's Petition, filed pursuant to Public Utilities Article ("PUA"), *Annotated Code of Maryland*, § 2-204(a), stated that FirstEnergy is currently embroiled in a "far-reaching racketeering and bribery scandal" involving federal criminal charges, numerous civil and regulatory proceedings in multiple states, the termination of several high-level executives, and the dramatic downgrade of FirstEnergy's and Potomac Edison's credit ratings.[4]

6. The Petition also alleged that FirstEnergy's scandal has had a direct impact on Potomac Edison by causing a downgrade to Potomac Edison's credit rating, thereby triggering a prohibition against Potomac Edison paying dividends to FirstEnergy, as well as asserting the possibility that Potomac Edison's Maryland customers have helped fund FirstEnergy's alleged criminal activities.[5]

7. OPC's Petition requested that the Commission initiate an investigation to examine 14 separate issues surrounding FirstEnergy's scandal in order to assess how the issues have impacted, and will continue to impact, Potomac Edison."[6]

8. On June 9, 2021, Potomac Edison filed a Response to the Petition, objecting to OPC's request for an investigation. Potomac Edison claimed that the Commission did not have jurisdiction to investigate, and that an investigation was not warranted, as Potomac

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[3] Petition at 2.
[4] *Id.* at 1.
[5] *Id*. at 2.
[6] *Id*.

Edison "remains on a firm financial footing and continues to provide safe and reliable service to its customers in Maryland."[7] Potomac Edison's Response acknowledged that "less than $38,000 of such improperly classified or inadequately documented [vendor services] funds were inadvertently reflected in distribution rates as a result of the last base rate case."[8]

9. On June 25, 2021, OPC filed a Reply to Potomac Edison's Response, restating its request that the Commission investigate and address any risks that Potomac Edison and its Maryland customers may be (or may have been) exposed to through FirstEnergy's alleged activities.[9]

10. On July 26, 2021, in Order No. 89888, the Commission concluded that many of the issues raised by OPC were either outside the Commission's jurisdiction or too attenuated to Potomac Edison's ratepayers to warrant an investigation.[10] However, the Commission granted OPC's Petition, in part, finding that an investigation was warranted into "certain issues that either impact Potomac Edison directly, or have a non-minimal likelihood of impacting Potomac Edison."[11] The Commission established a four-month discovery period and specified the issues to be investigated as follows:

> 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";
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> 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;

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[7] Maillog No. 235692.
[8] *Id.* at 9.
[9] Maillog No. 235910.
[10] *Id*. at 6.
[11] *Id.* at 7.

> 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.[12]

11. A discovery dispute arose on October 15, 2021, and OPC filed a Motion to Compel Potomac Edison to produce FirstEnergy's Investigation Report following its own internal investigation (through outside counsel) into the misconduct by several executives.[13] Potomac Edison opposed OPC's Motion, claiming that OPC's requests sought information that went beyond the scope of the proceeding.[14] A hearing on the Motion was conducted on November 4, 2021 by Commissioner Odogwu Obi Linton, at which each of OPC's requests at issue were addressed and ruled on, with Proposed Order No. 89990 encapsulating his rulings.[15] Potomac Edison appealed the Proposed Order on November 29, 2021.[16] OPC filed a Response to the Appeal on December 6, 2021.[17] On January 6, 2022, the Commission issued Order No. 90033, reversing the Proposed Order regarding the directed production of the First Energy Board's Investigation Report, but affirming the Proposed Order in all other respects.[18]

12. Following the conclusion of discovery, the Commission allowed the parties to file briefs regarding their positions based upon the evidence produced through discovery. OPC

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[12] *Id*.

[13] Maillog No. 237441. OPC's motion also requested many other documents. However, the Commission granted OPC's motion regarding all documents except FirstEnergy's internal investigation. In brief, the Commission concluded that this document was protected by attorney-client privilege, and FirstEnergy never waived that privilege. An ongoing issue in this case is the Commission's lack of jurisdiction in Ohio, which was the primary reason the Commission limited this investigation to only the three issues set forth above.

[14] Maillog No. 237671.

[15] Maillog No. 237877.

[16] Maillog No. 237987.

[17] Maillog No. 238091.

[18] Maillog No. 238455.

filed its Initial Post-Discovery Brief on February 18, 2022.[19] Potomac Edison filed its Response Brief on March 11, 2022,[20] OPC filed a Reply on March 28, 2022,[21] Potomac Edison filed a Surreply on April 7, 2022.[22] Solar United Neighbors of Maryland ("Solar United"), Montgomery County and Interstate Gas Supply also filed briefs on February 18, 2022.

III. PARTY POSITIONS

OPC

Developments Since OPC's Initial Petition

13. OPC notes that the Federal Energy Regulatory Commission ("FERC") issued an extensive audit report criticizing "significant deficiencies" in First Energy Service Company's ("FESC") cost allocation practices, both in general and connected to FirstEnergy's criminal conduct."[23] The report identified various internal control procedures that FirstEnergy agreed to implement. OPC contends (at the time of its brief in March of 2022) that it has yet to see the results of the implementation of these new procedures.[24]

14. FirstEnergy announced that it had settled shareholder derivative lawsuits related to the HB6 scandal that will result in six current board members not standing for re-election.

[19] Maillog No. 239254. OPC filed an Errata to its Initial Post-Discovery Brief (collectively, "OPC Brief") on February 22, 2022 (Maillog No. 239279).
[20] Maillog No. 239527
[21] Maillog No. 239795
[22] Maillog No. 240094
[23] OPC Brief at 1.
[24] *Id*.

This settlement was negotiated by the board's "Special Litigation Committee" – a four-member group that includes a designee of Carl Icahn.[25]

15. In its brief, OPC spends significant time highlighting the FERC's Division of Audits and Accounting's ("DAA") report and the various conclusions regarding internal controls. OPC's primary arguments center around the shortcomings contained in that report as well as its inability to obtain full discovery. OPC makes the same argument it made in its Motion to Compel – that Potomac Edison is using the fact that it lacks control over many documents as both a sword and a shield. At times, FESC will sponsor documents requested by OPC and at other times will assert privilege.

16. OPC urges the Commission to broaden the investigation to include FESC and FirstEnergy and permit discovery requests, including subpoenas directly on these companies.[26] Thereafter, OPC requests that the additional discovery period be followed by testimony and a hearing schedule.[27]

17. OPC contends that the Commission should order FirstEnergy and Potomac Edison to show cause why the "Icahn Agreement" should not be subject to review pursuant to PUA § 6-105.[28]

18. Additionally, OPC argues that the Commission should direct that all documents that FirstEnergy or its subsidiaries provided to FERC also be provided to Staff, OPC and the Commission.[29] The Commission should direct that the results of all other

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[25] *Id*. at 2.
[26] *Id*. at 14.
[27] *Id*.
[28] *Id*. at 15.
[29] *Id*.

investigations by federal or state authorities be submitted to the Commission and be made available for public review and comment.[30]

19. OPC argues for a full review by the Commission into FESC's charges to Potomac Edison as well as an independent and shareholder-funded audit of all charges imposed on Potomac Edison by FESC and require Potomac Edison to include in its next rate case the extent to which FirstEnergy's misconduct has affected its costs of accessing the money pool.[31]

Issue Two (Ratepayer Impacts)[32]

20. OPC does not believe that Potomac Edison is providing full documentation of the allocation of costs from FESC to Potomac Edison. OPC contends that the "Commission cannot credit Potomac Edison's contention that only $38,000 of 'improperly classified or inadequately documented funds' are reflected in Potomac Edison's current distribution base rates."[33]

21. Additionally, OPC contends that there appears to be no oversight of these costs allocated to Potomac Edison by FESC. Citing the DAA audit, OPC notes that the FERC "Audit staff found that, rather than provide detailed billing information as required, FESC provided certain aggregated cost information that made it difficult to discern the basis of costs charged."[34]

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[30] *Id*.

[31] *Id*. at 15-16. As noted below, these issues are largely moot as Potomac Edison has included these requests by OPC in Case No. 9695, filed on March 23, 2023.

[32] OPC does not substantively address Issue One. Rather, it briefly requests the Commission to direct that Potomac Edison address this issue in its next rate case. The Commission will address this issue in Case No. 9695.

[33] OPC Brief at 22.

[34] *Id*. at 27, citing DAA Audit Report at 59.

22. Regarding the Corporate Separation Audit conducted by the Public Utility Commission of Ohio ("PUCO"), OPC observes that FirstEnergy's utility subsidiaries "'have little insight into the allocated charges they are receiving from FirstEnergy Services Company' and that there is not a system in place to allow the subsidiaries to review or challenge a charge from FESC."[35]

23. Additionally, the same audit concluded that the proper cost allocators are often not used or, in the least, not effectively monitored: "[T]here is no procedure in place to help remind or ensure costs are directly charged as much as possible" and "[w]hile FirstEnergy has maintained a [Cost Allocation Manual], the [Cost Allocation Manual] lacks enough internal controls and oversight regarding the use of cost allocators and costs allocated to Ohio Companies to prevent cross-subsidization."[36]

Issue Three (PUA § 6-105)

24. OPC claims that the Icahn Agreement gives the Icahn group and Icahn directors "substantial influence over Potomac Edison". Once again, OPC notes that its attempts to obtain discovery from FirstEnergy or the Icahn Group regarding the negotiation of the agreement or the activities of the Icahn Directors and the FirstEnergy Board of Directors and its committees have been "frustrated".[37]

25. OPC summarizes that agreement as allowing the Icahn Group - which owns approximately 3.5% of FirstEnergy's shares valued at $707 million – to appoint two seats

[35] *Id*. at 28, quoting at length the Corporate Separation Audit at 82-83.
[36] *Id*. at 29, citing the Corporate Separation Agreement at 87-88.
[37] *Id*. at 30.

on the FirstEnergy Board of Directors. These directors have negotiating authority over the settlement of the shareholder derivative litigation in federal court.[38]

26. Citing Order No. 82619 at P 31 in Case No. 9173, OPC contends that "[an investor's] right to nominate a director to the [parent holding company]…is [a] way in which [the investor] will acquire the power to exercise substantial influence over [the holding company]." [39]

27. OPC points out that the Icahn Agreement provides special rights to the Icahn directors, including the requirement that FirstEnergy include an Icahn Director on any Executive committee.[40]

Potomac Edison

28. As a general matter, Potomac Edison notes that no party alleges that the Company is in violation of any statute or regulation. To the contrary, Potomac Edison contends that it has continued to meet its high reliability standards as well as its high level of customer satisfaction.[41]

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[38] *Id*. at 32. As noted below, these derivative lawsuits have now been settled.

[39] *In the Matter of the Current and Future Financial Condition of Baltimore Gas & Electric Company (Case No. 9173, June 19, 2009).* This case involved the purchase of 99.99% of Constellation's nuclear assets by Electricite de France, SA ("EDF"). The influence that EDF would have over Constellation, and indirectly on Baltimore Gas and Electric Company ("BGE"), went well beyond the ability to appoint one member to Constellation's Board. To protect against any undue influence by EDF, the Commission imposed a series of ring-fencing measures to separate the finances of BGE from Constellation. When FirstEnergy acquired the ability to exercise substantial influence over Potomac Edison, the Commission engaged in the same §6-105 analysis and imposed similar ring-fencing measures that remain in place.

[40] OPC Brief at 45, citing the Icahn Agreement at Paragraph 1.a(xi).

[41] Potomac Edison Brief at 5, fn 16. Additionally, Potomac Edison's application for increased rates addresses the Company's continued high levels of reliability as well as customer satisfaction. Case No. 9695, McGettigan Direct Testimony at 6-9.

Developments Since OPC's Initial Petition

29. Since May 11, 2021 (the date of OPC's Petition), FirstEnergy signed a Deferred Prosecution Agreement ("DPA") with the U.S. Attorney for the Southern District of Ohio.[42] In that agreement, the U.S. Attorney notes that FirstEnergy was completely cooperative and provided requested documents expeditiously.[43]

30. The Company also notes that FirstEnergy has refinanced two maturing credit agreements, after which S&P Global ("S&P") raised its credit rating one notch and allowed Potomac Edison to remain one notch higher.[44] Additionally, First Energy secured $3.4 billion in equity investment and resolved many pending issues with the Public Utilities Commission of Ohio. This resulted in S&P raising the Company's issuer credit rating to BBB.[45]

31. Potomac Edison notes that the separate audits of FirstEnergy conducted by FERC and PUCO were conducted based on their primary jurisdiction over FESC.[46] Potomac Edison claims that OPC is wrongly requesting that the Commission do a second-level review of these audits, which it claims is unnecessary and irrelevant to the three issues that are the subject of this investigation.[47]

Issue One – (Money Pool Impacts)

32. Potomac Edison claims it has no money borrowed from the money pool and hasn't for the last two years. The Company notes that no party substantively discussed this issue

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42 *Id*. at 7.
43 FirstEnergy Current Report filed on Form 8-K on July 21, 2021 – Potomac Edison Exhibit 10.1 at 3.
44 Potomac Edison Brief at 8, Exhibit 1
45 *Id*. at Exhibit 2.
46 *Id*. at 9, fn 35.
47 *Id*. at 10.

in their initial briefs. To the extent Potomac Edison has incurred increased borrowing costs, the Commission can address this issue in its 2023 rate case.[48]

Issue Two – (Ratepayer Impacts)

33. Potomac Edison contends that it has provided OPC with every payment by the Company to third-party vendors and every allocation of costs from FESC over four years. Those documents reveal that $38,000 was "misallocated" to Potomac Edison, which represents .03% of Potomac Edison's approved distribution revenue requirement.[49]

34. Potomac Edison also notes that after months of discovery, no party can identify any costs in addition to the $38,000 that Potomac Edison proactively identified. Finally, Potomac Edison has created a regulatory liability to refund $38,000 to customers with interest.[50] The Commission can address this regulatory liability in its 2023 rate case.[51]

Issue Three (PUA § 6-105)

35. Potomac Edison does not believe the "Nomination Agreement" is subject to Commission review under PUA § 6-105, because that agreement resolved an existing shareholder dispute involving the composition of the Board of Directors.[52] Additionally, Potomac Edison notes that the Commission has never weighed in on the composition of a utility's Board of Directors, much less that of a utility's parent company.[53] Potomac Edison

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[48] *Id*. at 11. As noted above, Potomac Edison filed that rate case on March 23, 2023 and is ongoing as Case No. 9695.
[49] *Id*. at 12.
[50] *Id*.
[51] In its application for increased rates in Case No. 9695, Potomac Edison describes this regulatory liability as well as how the Company intends to determine the proper amount of the refund for each customer. Case No. 9695, Valdes direct testimony at 28-32 and Exhibits 1-5.
[52] Potomac Edison Brief at 13, fn 48 (citing OPC Brief at A-11).
[53] *Id*. at 13.

also points out that the Icahn board members are subject to the same fiduciary obligations as the other FirstEnergy directors.[54]

36. Finally, Potomac Edison notes that OPC has issued several press releases that assume the outcome of this litigation, contradicting the original claim in its Petition that it would follow the evidence objectively to protect Maryland ratepayers.[55]

a. Other Interested Parties

Solar United Neighbors of Maryland ("SUN")

37. Like OPC, SUN contends that the Commission should broaden this investigation to include FirstEnergy and FESC. SUN notes that the limited breadth of this proceeding makes it impossible to acquire evidence as to why this bribery scandal occurred and the extent to which Potomac Edison may have incurred misallocated costs as far back as 10 years.[56]

38. SUN argues that the Commission must expand its investigations and allow direct discovery of FirstEnergy or it cannot uncover the truthfulness of various statements by FESC employees, which SUN contends contradict themselves. Potomac Edison's discovery responses rely upon the statements by Mr. Valdes and Ms. Mikkelson, the latter being an employee of FESC who was terminated following this scandal.[57]

39. SUN also cites the findings of inadequate internal controls contained in FERC's audit report - specifically controls over accounting costs for civic, political and lobbying

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[54] Potomac Edison response to OPC's Petition at 16.
[55] Potomac Edison Brief at 13 at fn 49.
[56] SUN Brief at 3
[57] *Id*. at 6.

efforts that do not involve Potomac Edison.[58] SUN also urges the Commission to require FirstEnergy to produce all of the results of the myriad investigations into the bribery scandal, including the audit by the New Jersey Board of Public Utilities.[59]

40. Additionally, SUN urges the Commission to conduct its own independent audit, alleging that doing otherwise would be the equivalent of allowing FirstEnergy to investigate itself.[60] SUN asks that the independent auditor review the allocation of charges in light of the U.S. Circuit Court for the District of Columbia's recent decision in *Keryn et al v. FERC,*[61] which broadens the definition of what is considered political spending and must therefore be excluded from rates.

Montgomery County

41. Montgomery County limits its argument to the second issue – "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…"[62]

42. Montgomery County shares OPC's concern that Potomac Edison lacks a procedural safeguard against a future misallocation of funds similar to the $38,000 in undisputed funds identified in this case.[63] Citing extensively from the FERC DAA, Montgomery County details several recommendations (which FirstEnergy has accepted) for corrective action. These include: (1) critically review and strengthen internal controls in FirstEnergy and its

[58] *Id*. at 7, citing FERC Audit Report at 47-48. The Commission notes that these audits involve issues well beyond the scope of this limited proceeding and should be raised in the pending Potomac Edison rate case.
[59] SUN Brief at 11.
[60] *Id*. at 12-13.
[61] 22 F.4th 189 (D.C. Circuit Dec. 28, 2021).
[62] Montgomery County Brief at 1-2.
[63] *Id*. at 2.

subsidiaries; (2) perform an analysis of costs that FirstEnergy and its subsidiaries incurred associated with internal and external lobbying activities; and (3) submit a refund analysis, within 60 days of the audit report and on a rolling basis within 60 days of conclusion, of each investigation that: (1) details the calculation of the refunds, plus interest; (2) the determinative components of the refund; (3) the refund method; (4) the wholesale transmission members to receive refunds; and (5) when the refunds will be made.[64]

43. Montgomery County requests the Commission keep this case open to address these issues or, in the alternative, consider any suggestions the parties put forward to prevent a recurrence of the misallocation of funds this case has uncovered.[65] The Commission acknowledges that the many recommendations made by many parties to the investigation may help avoid future misallocation of FirstEnergy funds. Montgomery County acknowledges in its brief that FirstEnergy has agreed with the recommendations in FERC's DAA.

Interstate Gas Supply, Inc./Vistra Corp.

44. Interstate Gas Supply Inc. and Vistra Corp. (together "IGS") argue that the Commission should: (1) continue the investigation in this matter; (2) broaden this investigation to include FirstEnergy; and (3) retain an independent auditor to analyze the relationship between FirstEnergy and Potomac Edison.[66]

45. IGS cites an audit performed in Ohio by Blue Ridge Consulting Services Inc. ("Blue Ridge") that identified $24,460,960 in misallocated funds to three Ohio utilities.[67]

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[64] *Id*. at 3-4.
[65] *Id*. at 4.
[66] IGS Brief at 1.
[67] Those utilities are The Cleveland Electric Illuminating Company, The Ohio Edison Company and The Toledo Edison Company.

Additionally, IGS notes that Daymark Energy Advisors ("Daymark") released its September 13, 2021 audit report, which concluded that "it does not appear that any direct Ohio Companies' staff review the cost allocations that are assigned, nor does the business services group assigned to serve the Ohio companies review these allocations on a regular basis."[68]

46. Based upon these audits, IGS contends that it is likely Potomac Edison has also suffered more significant misallocations than are currently known. IGS also cites the FERC DAA report for the same purpose as other parties to this case, noting that FERC identified many political/lobbying costs allocated to utility subsidiaries, some of which go back 10 years.[69]

IV. COMMISSION DECISION[70]

Summary

47. As an initial matter, the Commission rejects many of OPC's accusations, including the inaccurate contention that Potomac Edison "has admitted that FESC passed certain costs associated with FirstEnergy's criminal conduct in Ohio to Potomac Edison's customers".[71] There is no evidence that the misallocated $38,000 for which Potomac Edison has created a regulatory liability had anything to do with FirstEnergy's misconduct in Ohio.

48. OPC's repeated claim that its discovery attempts have been stymied simply reflects the incontrovertible fact that the Commission has no jurisdiction over FirstEnergy's

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[68] IGS Brief at 4.
[69] *Id*. At 6.
[70] Commissioner Odogwu Obi Linton did not participate in this decision. Commissioner Michael T. Richard dissents, as noted below.
[71] OPC Brief at 3.

misconduct in Ohio, where this scandal occurred. OPC seems unwilling to accept the fact that the proper investigations into that misconduct were conducted by the relevant federal authorities and those in the State of Ohio. Those authorities included the U.S. Department of Justice, FERC, the SEC, as well as the Attorney General in Ohio and the Public Utilities Commission of Ohio. The Commission simply is not the proper authority to conduct the type of investigation that OPC seeks. The Commission's jurisdiction is only over the possibility that the ramifications of that scandal affected Potomac Edison ratepayers. The existing record provides no basis to extend discovery in this case.

49. On March 22, 2023, FirstEnergy filed an "Application for Adjustments to it Retail rates for the Distribution of Electric Energy."[72] In that Application, Potomac Edison addressed issues that the parties are investigating in this case, and OPC, as well as any other party, will have an opportunity to request further discovery into any effects the Ohio scandal had on Potomac Edison's ratepayers.

50. For example, Potomac Edison Witness Valdes discusses how Potomac Edison has created a regulatory liability to refund the misallocated $38,000.00 (with interest) to its customers.[73] Additionally, Potomac Edison Witness Ashton testifies about the changes that Potomac Edison has adopted to prevent a recurrence of the misallocations addressed in the present case. [74] Witness Ashton also provides the current copy of the Company's Cost Allocation Manual as well as an independent audit of this manual by PriceWaterhouse.[75]

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[72] Case No. 9695.
[73] *Id*., Valdes Direct at 28-32 and Exhibits REV 1-5.
[74] *Id*., Ashton Direct at 29-39.
[75] *Id*., Exhibit TMA 2.

51. OPC argues that Mr. Valdes' analysis of the allocations to Potomac Edison lacks a sufficient factual predicate to be reliable under the Maryland or Federal Rules of Evidence.[76] To the extent OPC wishes to depose or otherwise examine Mr. Valdes' conclusions, it may do so in Case No. 9695. However, to date, the record contains no basis to conclude that Mr. Valdes' did not conduct his audit in good faith – an audit that FESC or Potomac Edison could have performed at any time, regardless of the bribery scandal.

52. The balance of OPC's arguments regarding the rate impact of the Ohio scandal are much broader than that scandal, but rather reflect an overall concern that Potomac Edison either fails to verify, or lacks the ability to verify, the costs allocated from FESC.[77] To the extent that FESC is allocating costs to Potomac Edison that have nothing to do with Potomac Edison, these are issues appropriately raised in the newly filed rate case, and the Commission encourages OPC to bring those into the record in Case No. 9695. However, while these concerns about Potomac Edison's ratepayers paying for costs unrelated to Potomac Edison are properly raised, these costs do not relate to the FirstEnergy misconduct that formed the basis for this specific proceeding. These are general costs that are subject to the rate-making standards that all utility costs must meet to be approved and included in rates.

[76] OPC Brief at 23, citing Federal Rule of Evidence 26(b)(2), which "requires a testifying expert to voluntarily disclose the 'facts or data considered by the witness in forming' his opinions."

[77] *Id*. at 25-27, citing FirstEnergy's charitable donations of $1,630 to Ohio First Fund Inc.; $1,668 to the Cleveland State University Foundation; $207,603 to Cleveland Indians Baseball; $52,702 to Akron Baseball LLC; $11,085 to the Greater Abyssinia Baptist Church; and $4,367 to various chapters of the United Way.

53. Regarding FirstEnergy's failure to oversee the proper cost allocators, that issue is squarely before the Commission in Case No. 9695.[78] Potomac Edison has provided the results of an independent audit conducted by PriceWaterhouse into precisely the concerns OPC has raised, and OPC will have the full discovery period to investigate all relevant aspects of that audit.

54. Regarding whether the Icahn Group acquired the ability to exercise substantial influence over Potomac Edison by virtue of its ability to appoint two members to FirstEnergy's Board of Directors, as well as its ownership of 3.5% of FirstEnergy stock, the Commission finds irrelevant whether the Icahn's Group's various stages of increased influence are considered one act or a common purpose. A person may already have some influence over a utility, and PUA § 6-105 grants the Commission discretion to determine when an incremental increase in that discretion becomes substantial. The Commission's conclusion that the Icahn Agreement does not provide a sufficient reason to require Commission review is that, unlike Case No. 9173, the agreement involves what can essentially be described as a personnel decision. Historically, the Commission does not involve itself in such decisions, and it is not clear that the Commission has the authority to do so even if it desired. The Commission does not weigh in on the appointments of new Chief Executive Officers for a utility or its parent company. The purpose of PUA § 6-105 is to safeguard utilities from financially risky outside influences. The Icahn Agreement is an internal matter within FirstEnergy.

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[78] Case 9695, Ashton Direct at 38-42 and Ex. TMA-2. Exhibit TMA-2 includes an independent audit of First Energy's compliance with FESC's CAM by PriceWaterhouse.

Issue One (Money Pool Impacts)

55. The Commission agrees with Potomac Edison, and no other party has substantively argued this issue. As noted in the Company's brief, when Potomac Edison borrows from FirstEnergy's money pool, those costs are treated as short-term debt. Therefore, customer rates would only be impacted by the Ohio HB6 scandal if Potomac Edison's credit ratings were worse in its next base rate test year than they otherwise were before the Ohio HB6 scandal and if the Company borrowed from the money pool during the test years.[79]

56. This issue is squarely before the Commission in the Company's ongoing rate case, and the Commission need not rule prospectively on whether money pool borrowing might increase customer rates in the future. As discussed above, FirstEnergy has taken many steps to resolve the issues related to this scandal and increase its credit rating to approximately the same level as it was previously. To the extent any lingering issues exist, the Commission agrees with Potomac Edison that the pending rate case is the proper process through which to address any actual - rather than projected - cost-increases in Potomac Edison's short-term debt.

Issue Two (Ratepayer Impacts)

57. In response to OPC's Data Request 1-1, Potomac Edison turned over work-papers associated with Mr. Valdes' audit of costs allocated to the Company by FESC. OPC's motion to compel raised this precise issue, and the Commission granted its motion, noting that Potomac Edison claimed to have nothing further to produce.[80]

[79] Potomac Edison Brief at 15-16.

[80] November 18, 2021 Proposed Order by Commissioner Linton at 2.

58. The Commission finds no basis upon which to conclude that Potomac Edison possesses any documents or other evidence that could establish a financial harm to its ratepayers as a result of the HB6 scandal. Many documents are outside the Commission's jurisdiction, but the possible misdirection of scandal-related money to subsidiary ratepayers has been investigated heavily by authorities with primary jurisdiction over FirstEnergy. The Commission will not perform a secondary review of their findings.

59. OPC requests that the Commission include FirstEnergy and FESC as parties to this case, but the Commission has no jurisdiction or authority upon which to do so. When the Commission approved FirstEnergy's acquisition of substantial influence over Potomac Edison, FirstEnergy agreed to submit to Commission jurisdiction solely for the purposes of enforcing the conditions of the approval. Based upon the generalized findings in discovery, the Commission finds no reason to attempt to bootstrap jurisdiction in the case from a particular condition. The Commission will address all wrongly allocated charges to Potomac Edison in Case No. 9695.

Issue Three (PUA § 6-105)

60. The Nomination Agreement clearly does not permit the Icahn Group the level of substantial influence over Potomac Edison contemplated by PUA § 6-105. The Icahn Group was a FirstEnergy shareholder before the Company entered into the Nomination Agreement, and neither the Icahn Group nor the Icahn Board designees are acquiring any FirstEnergy or Potomac Edison assets in connection with the agreement.[81]

[81] Nomination Agreement at para. 7. (OPC Appendix A-11).

61. The Commission also agrees with Potomac Edison that the scope of PUA § 6-105 becomes overly broad if the Commission interprets that provision to involve itself in personnel decisions that are internal to FirstEnergy. Such disputes are better resolved by FirstEnergy shareholders, which is precisely why FirstEnergy entered the Nomination Agreement - to resolve a shareholder dispute.

62. In Case No. 9173, the Commission required approval for a major asset purchase which concurrently allowed EDF to appoint a seat on the Board of Directors. However, the influence that EDF could potentially exert on BGE went far beyond that one issue. Without expanding on exactly when a partial influence becomes "substantial", the Commission notes that the remedy for EDF's acquisition of substantial influence was, among other conditions, to tightly ring-fence BGE and ensure financial separation from any potential bankruptcy that Constellation's joint venture with EDF might cause. In this case, the Commission imposed similar ring-fencing measures when FirstEnergy acquired Potomac Edison, and the Commission concludes that no basis exists upon which to believe that these ring-fencing measures are insufficient to protect Potomac Edison from any financial harm that the Nomination Agreement may or may not cause. In short, OPC's request that the Commission require approval for the designation of two seats on FirstEnergy's Board would involve a level of micro-management that the Commission declines to impose.[82]

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[82] *Re Sapphire Communications of Maryland, Inc.* 79 Md. PSC 353, Order No. 68243 (Oct. 27 1988) (holding that the Commission "will take no action to interfere with C&P's business judgment, in accordance with the established rule that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."*)*

V. Conclusion

63. Based upon the record and the extensive briefing by the parties, the Commission concludes that further discovery in this matter would not be productive and closes this investigative proceeding. Any outstanding issues that were identified above will be addressed in Case No. 9695.

IT IS THEREFORE, this 5th day of May, in the year Two Thousand Twenty-Three, by the Public Service Commission of Maryland, **ORDERED**:

(1) that the Commission concludes this investigative proceeding; and

(2) that the Commission will address those outstanding issues identified above in Case No. 9695.

/s/ Jason M. Stanek

/s/ Anthony J. O'Donnell

/s/ Patrice M. Bubar

Commissioners[83]

[83] Commissioner Michael T. Richard dissents as follows: I respectfully dissent on concluding this investigation. I agree with the positions of OPC, Montgomery County, SUN and IGS that there is still work to be done to understand the impacts on Potomac Edison customers resulting from the FirstEnergy bribery scandal and the misallocation of funds. In my view, further investigation of this matter by the Commission could help prevent a recurrence of funds misallocation and better protect Potomac Edison customers. I also note that I had previously supported Commissioner Linton's Proposed Order directing Potomac Edison to provide OPC a copy of the FirstEnergy Board of Directors' Investigation Report, an order the majority overturned. That ruling—in my opinion—deprived OPC and other interested parties of important information to fully develop the record to support a productive investigation.