

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND**

**In the Matter of the 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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**Case No. 9667**

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**OFFICE OF PEOPLE’S COUNSEL’S MOTION FOR REHEARING  
OF COMMISSION ORDER NO. 90615**

**PUBLIC**

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Pursuant to Public Utilities Article § 3-114 and COMAR 20.07.02.08, the Office of People’s Counsel requests that the Commission grant rehearing of Order No. 90615, in which the Commission terminated its investigation into the impacts of FirstEnergy’s “HB6 scandal” on Potomac Edison and its ratepayers.<sup>1</sup> The decision to do so was wrong for the reasons summed up in Commissioner Richard’s dissent: “there is still work to be done to understand the impacts on Potomac Edison customers resulting from the

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<sup>1</sup> Potomac Edison is sometimes also referred to as “company,” and FirstEnergy is sometimes referred to as “FE.” “HB6 Scandal” (or “HB6 Scandals”) refers to the admissions in FirstEnergy’s Deferred Prosecution Agreement (“DPA”) that the corporation paid roughly \$60 million to “Generation Now,” a 501(c)(4) organization purportedly controlled by Speaker of the Ohio House of Representatives Larry Householder, in exchange for the passage of a \$1.3 billion bailout bill (known as “House Bill 6” or “HB6”) that benefited two FirstEnergy nuclear plants, and paid some \$4.3 million to the former Chair of the Ohio Public Utilities Commission for official actions supporting FirstEnergy’s nuclear and other regulatory priorities. *United States of America v. FirstEnergy Corp.*, Deferred Prosecution Agreement, Case No. 1:21-cr-86 (S.D. Ohio 2021) (DPA). It was described as “likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio” by U.S. Attorney David M. DeVillers, who charged Householder and four others with racketeering. Teo Armus, *GOP Ohio House speaker arrested in connection to \$60 million bribery scheme*, The Washington Post (July 22, 2020), <https://www.washingtonpost.com/nation/2020/07/22/ohio-house-speaker-arrested-republican/>. Householder was convicted of racketeering in March 2023.

FirstEnergy bribery scandal and the misallocation of funds,”<sup>2</sup> and “further investigation of this matter by the Commission could help prevent a recurrence of funds misallocation and better protect Potomac Edison customers.”<sup>3</sup>

For the reasons stated by Commissioner Richard, those presented earlier in this proceeding, and those below, the Commission should reconsider and reverse Order No. 90615. Instead of terminating this matter, the Commission should engage in the work “still to be done” by continuing this investigation and expanding the discovery rights of participants in it. The events giving rise to this proceeding hopefully will remain unprecedented. The best way to ensure that is true is to investigate thoroughly: (1) why and how Potomac Edison ratepayers ended up funding criminal conduct; (2) the extent to which ratepayer funds were used for this scheme; and (3) what can and should be done to prevent its future occurrence. The Commission’s decision to shut down this investigation prematurely accomplishes none of these important objectives, leaving Potomac Edison customers unprotected. And the notion in Order No. 90615 that other proceedings before this Commission—or other regulators charged with different responsibilities—can

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<sup>2</sup> Order No. 90615 on Investigation, Case No. 9667 (May 5, 2023) at 22, n. 83. Commissioner Linton, who earlier in this docket issued a proposed order directing the production of a copy of the FirstEnergy Board of Directors’ Investigation Report concerning the impacts of the HB6 scandal that was subsequently overturned by a three-Commissioner majority, did not participate in Order No. 90615. It is unclear why Commissioner Linton did not participate, and as part of this motion OPC seeks clarification on this question.

Commissioner Richard expressed concern that the majority’s decision to overturn that ruling “deprived OPC and other interested parties of important information to fully develop the record to support a productive investigation.” *Id.*

<sup>3</sup> *Id.*

provide the protections Potomac Edison's Maryland customers need and deserve is unfounded. The place and time to act is here and now.

## **STATEMENT OF ERRORS**

Pursuant to COMAR 20.07.02.08C, OPC submits that Order No. 90615 contains the following unlawful, erroneous, unsubstantiated, and arbitrary and capricious findings and conclusions:

- Order No. 90615 errs as a matter of fact and law in finding that there is no evidence that the \$38,000 regulatory liability that Potomac Edison has created relates to the HB6 scandals.
- Order No. 90615 is arbitrary and capricious and not supported by substantial evidence because the finding that there is no evidence that the \$38,000 regulatory liability created by Potomac Edison relates to the HB6 scandals is contradicted by opposite evidence found elsewhere in the order.<sup>4</sup>
- Order No. 90615 errs as a matter of fact and law and is arbitrary and capricious in finding that the \$38,000 regulatory liability that Potomac Edison has created constitutes a reliable and comprehensive accounting of the adverse impacts on Potomac Edison to ratepayers as a consequence of the HB6 scandals.
- Order No. 90615 errs as a matter of fact and law and is arbitrary and capricious in finding that the Commission lacks jurisdiction to compel discovery from FirstEnergy and First Energy Service Company ("FESC"), where the record demonstrates that FirstEnergy and FESC officers and employees (1) conducted the investigation into the adverse impacts to ratepayers relating to the HB6 scandals, (2) calculated the amount of regulatory liability associated with this wrongdoing, and (3) sponsored the data responses in this proceeding concerning these matters.
- Order No. 90615 is arbitrary, capricious, and unsupported by substantial evidence where the Commission's findings are based on the acceptance of assertions by FE and FESC personnel while simultaneously finding that the Commission lacks the authority to permit discovery into the bases for these assertions.
- Order No. 90615 errs as a matter of fact and law and is arbitrary and capricious in finding that the amount of misallocated and misclassified charges in current rates,

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<sup>4</sup> Order No. 90615 at 1.

and the necessary safeguards to protect ratepayers from a recurrence of these improprieties, are matters properly addressed in Case No. 9695, and/or other proceedings and investigations by other authorities.

- Order No. 90615 errs as a matter of fact and law and is arbitrary and capricious in closing this investigation without implementing additional measures to:  
(i) ascertain the amount of misallocated and misclassified charges in current rates, including but not limited to those associated with the HB6 scandals, and (ii) ascertain and impose the necessary safeguards to protect Potomac Edison customers from a reoccurrence of these improprieties.
- Order No. 90615 errs as a matter of fact and law and is arbitrary and capricious in concluding that the protection of Potomac Edison ratepayers is appropriately left for other authorities, including the U.S. Department of Justice, FERC, the SEC, and the Attorney General in Ohio and the Public Utilities Commission of Ohio, where none of those entities are charged with protecting Potomac Edison's retail ratepayers.
- Order No. 90615 errs as a matter of fact and law and is an unexplained departure from Commission precedent in finding that the Icahn Group and Icahn-appointed directors have not obtained the ability to exercise substantial influence over Potomac Edison by means of a concerted scheme to invest in FirstEnergy and acquire seats on the FirstEnergy Board of Directors pursuant to the Icahn Agreement.
- Order No. 90615 errs as a matter of fact and law in not directing FirstEnergy and Potomac Edison to show cause as to why the Icahn Agreement<sup>5</sup> should not be subject to Section 6-105 of the Public Utilities Act.

As further discussed below and pursuant to COMAR 20.07.02.08D, compliance with the Commission's decisions in Order No. 90615 would cause significant harm to Maryland residential ratepayers, and that harm justifies a reversal of the order.

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<sup>5</sup> A copy of the Icahn Agreement appears at Appendix A to the Letter from Jeffrey P. Trout, counsel to Potomac Edison, to Andrew Johnson, Executive Secretary Maryland Public Service Commission (Mar. 31, 2021) ("Icahn Agreement").

## ARGUMENT

### **I. Order No. 90615 errs in finding that there is “no evidence” that Potomac Edison customer monies were used to fund FirstEnergy’s racketeering and bribery scheme.**

Order No. 90615: (1) finds that “[t]here 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;” and (2) “rejects” OPC’s “contention that Potomac Edison ‘has admitted that FESC passed certain costs associated with FirstEnergy’s criminal conduct in Ohio to Potomac Edison’s customers.’”<sup>6</sup> These findings form a substantial basis for the Commission’s decision to terminate this proceeding, but they are contrary to express admissions by Potomac Edison. Indeed, the Order contradicts itself as to whether these findings are credible. In the introduction of Order No. 90615, 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.*”<sup>7</sup> In other words, the Commission acknowledges Potomac Edison’s admission that its customers have been harmed by the HB6 scandals, even as it concludes elsewhere in the Order that “FirstEnergy’s misconduct in Ohio” had no impact on Potomac Edison.

In fact, Potomac Edison has on several occasions in this proceeding made admissions that demonstrate that the findings in paragraph 47 are incorrect.

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<sup>6</sup> Order No. 90615 at 15.

<sup>7</sup> *Id.* at 1 (emphasis added).

At the outset of this investigation, Potomac Edison acknowledged its “identifi[cation of some] \$38,000 of . . . improperly classified or inadequately documented funds that were inadvertently reflected in distribution base rates” and explained that the statement was based upon “FirstEnergy’s Board of Directors . . . independent internal investigation in light of the government investigations currently underway in Ohio.”<sup>8</sup> Dispelling any doubts as to the referenced “government investigations,” Potomac Edison described the creation of a corresponding regulatory liability as a “precaution[ary]” undertaking, saying so in a statement directly under the heading, “[w]hether 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.”<sup>9</sup>

Potomac Edison has never wavered from the admission that funds<sup>10</sup> connected with FirstEnergy’s HB6 wrongdoing are reflected in current Potomac Edison rates. The company’s Reply Brief states that “Potomac Edison’s full analysis of its conclusion that less than \$38,000 of improperly classified or inadequately documented funds associated

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<sup>8</sup> In the Matter of the Petition of People’s Counsel to Investigate the Future of FirstEnergy’s Relationship with Potomac Edison in Light of Recent Events (PE Response to OPC Petition), Case No. 9667 (June 9, 2021) at 9.

<sup>9</sup> *Id.*

<sup>10</sup> Potomac Edison originally calculated that the annual amount of these charges reflected in rates is \$37,588.39. Initial Post-Discovery Brief of the Office of People’s Counsel (OPC IB), Case No. 9667 (Feb 18, 2022) at Attach. A-182. As discussed below, data provided by Potomac Edison in its rate case, Case No. 9695, indicates that the amount is actually higher.

with the Ohio HB6 Activities had been reflected in Maryland distribution rates has now been in OPC’s hands for *six months*.”<sup>11</sup>

The company likewise responded to a discovery request by providing a breakdown of its regulatory liability, showing that \$8,505 dollars were attributable to payments to Generation Now and Hardworking Ohioans, \$1,238 were for payments to the Sustainability Funding Alliance of Ohio, and \$27,844 were paid to Vendors A-D.<sup>12</sup> Potomac Edison’s breakdown was a concession that at least \$9,744[] of the amounts currently reflected in base rates were used to fund the Ohio bribery scheme.<sup>13</sup> As regards the Vendor A-D payments, Potomac Edison’s discovery response showed that another \$27,844.33 of these funds were paid to **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

**[END CONFIDENTIAL]** Potomac Edison not only failed to dispute that *at least* “\$9,744[] of the amounts currently reflected in base rates were used to fund the Ohio bribery scheme,” it admitted that the entire roughly “\$38,000 of improperly classified or inadequately documented funds associated with the Ohio HB6 Activities” were connected to FirstEnergy’s HB6 activities and were reflected in current Potomac Edison rates.<sup>15</sup>

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<sup>11</sup> Potomac Edison’s Reply to Post-Discovery Briefs and Comments (PE Reply Br.), Case No. 9667 (Mar. 11, 2022) at 21 (emphasis added).

<sup>12</sup> OPC IB, Attach. A-181, Response to Data Request OPC 3.8; OPC IB, Attach. A-182 (referencing “Generation Now and HWO,” and “Sustainability”).

<sup>13</sup> *Id.* at 16 n.28.

<sup>14</sup> PE Response to OPC DR No. 5.9; *But see* n. 23 below.

<sup>15</sup> PE Reply Br. at 21.

The Commission cannot dismiss these admissions as inadvertent, as they appear multiple times in Potomac Edison’s submissions, nor are there contrary statements elsewhere in the company’s filings. Quite simply, these are binding and conclusive judicial admissions to something outrageous: that Potomac Edison ratepayer monies were used to fund criminal conduct engaged in by the company’s corporate parent.<sup>16</sup> Order No. 90615 provides no basis for a contrary finding, and there is none. Rather than shutting down the investigation, this admission should have led the Commission to ensure that no additional customer funds were being used to conduct FirstEnergy’s criminal activities.

To be clear, Potomac Edison’s admission is not surprising. The evidence underlying the company’s admission is compelling. Based upon FirstEnergy’s admissions in other proceedings, it is beyond reasonable dispute that the \$38,000 regulatory liability reflects FESC’s charges to Potomac Edison used to fund FirstEnergy’s HB6 wrongdoing. FirstEnergy entered into the DPA acknowledging its criminal responsibility with respect to the HB6 scandals.<sup>17</sup> The Statement of Facts accompanying that Agreement includes FirstEnergy’s “stipulat[ion] and agree[ment] that if [the] case proceeded to trial, the United States would prove the facts set forth.”<sup>18</sup> And the DPA’s same Statement of Facts contains the following admission with respect to Generation Now: “FirstEnergy paid millions of dollars to Public Official A through his 501(c)(4), Generation Now, in return for Public Official A pursuing nuclear legislation for FirstEnergy Corp’s benefit in his

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<sup>16</sup>*Miller v. State*, 380 Md. 1, at 16 n. 3 (Md. 2000) (statement in brief constituted judicial admission); *Meyer v. Berkshire Life Ins. Co.* 372 F.3d 261, at 265 n.2 (4<sup>th</sup> Cir. 2004) (deliberate, clear, and unambiguous statement of counsel in reply brief constituted judicial admission).

<sup>17</sup> See OPC IB at 6 & n.1 (citing DPA).

<sup>18</sup> *Id.* at 6 n.1 (quoting DPA).

capacity as a public official.”<sup>19</sup> OPC’s Petition initiating this proceeding noted that “Generation Now pled guilty on January 29, 2021, admitting that ‘Generation Now was organized at Householder’s direction’ for his benefit . . . ‘to be used as a mechanism to receive undisclosed donations to benefit Householder and to advance Householder’s efforts to become Speaker of the Ohio House of Representatives.’”<sup>20</sup> With respect to Hardworking Ohioans, FBI Special Agent Wetzel testified at the criminal trial of former Speaker Householder that it was an entity funded by Householder through Generation Now to run advertisements against Ohio candidates deemed hostile to HB6.<sup>21</sup> Also, in the same trial where Householder was convicted of participating in a racketeering conspiracy,<sup>22</sup> Agent Wetzel identified Mr. Tony George as being on the “farm” – a group of individuals central to the HB6 conspiracy as described by former Householder aide Jeffrey Longstreth,<sup>23</sup> who also pled guilty to the HB6 bribery scheme.<sup>24</sup>

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<sup>19</sup> DPA at 17.

<sup>20</sup> OPC Petition at 6 (quoting Plea Agreement, Att. A at 7, *United States v. Generation Now*, No. 1:20-CR-077 (S.D. Ohio Feb. 5, 2021).

<sup>21</sup> *United States v. Householder*, No. 1: 20-cr-077, Tr. at 26 of 165 (S.D. Ohio Feb. 10, 2019).

<sup>22</sup> Press Release, *S.D. Ohio, Jury convicts former Ohio House Speaker, former chair of Ohio Republican Party of participating in racketeering conspiracy*, United States Attorney’s Office (Mar. 9, 2023), <https://www.justice.gov/usao-sdoh/pr/jury-convicts-former-ohio-house-speaker-former-chair-ohio-republican-party>.

<sup>23</sup> *United States v. Householder*, No. 1: 20-cr-077, Tr. at 67 of 111 (S.D. Ohio Jan. 24, 2023). *See also Id.* at 74-111. Additionally, in a May 2022 deposition given by Tracy Ashton, Assistant Controller for FirstEnergy and witness in Case No. 9695, she admitted that FirstEnergy knew Tony George to be Individual B in FirstEnergy’s DPA, who acted as an intermediary to pass communications related to HB6 between Larry Householder and FirstEnergy. *See Joint Motion to Amend Interlocutory Appeal by Adding the Attached Deposition Transcripts of FirstEnergy Assistant Controller Tracy Ashton by Office of the Ohio Consumers’ Counsel, Public Utilities Commission of Ohio Case No. 17-974-EL-UNC (Aug. 19, 2022) at 4.*

<sup>24</sup> Press Release, *Political strategist & lobbyist each plead guilty in federal public corruption racketeering conspiracy involving more than \$60 million*, United States Attorney’s Office, S.D. Ohio (Oct. 29, 2020), <https://www.justice.gov/usao-sdoh/pr/political-strategist-lobbyist-each-plead-guilty-federal-public-corruption-racketeering>.

The DPA Statement of Facts also contains FirstEnergy’s admission that:

FirstEnergy Corp. paid \$4.3 million dollars to Public Official B through his consulting company in return for Public Official B performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.<sup>25</sup>

Similarly, an audit of FESC conducted by the Federal Energy Regulatory Commission (FERC) and attached to OPC’s initial brief finds that FirstEnergy made this payment to the Sustainability Funding Alliance of Ohio, Inc., an entity “associated with” the former Chair of the PUCO.<sup>26</sup> FirstEnergy does not dispute this finding.

Of and by itself, Order No. 90615’s erroneous finding that no Potomac Edison ratepayer monies were used to fund FirstEnergy’s criminal activities renders the order unsound. The Commission initiated this proceeding, in large part, to determine:<sup>27</sup>

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.

The Commission seeks in Order No. 90615 to conclude its investigation by answering “No” to the question of *whether* FirstEnergy used Potomac Edison funds in furtherance of their misconduct in Ohio when Potomac Edison has admitted, and the record shows beyond dispute, that the answer is “Yes.” This Commission must reconsider and reverse

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<sup>25</sup> DPA at 17.

<sup>26</sup> OPC IB, Attach. 150, Audit Report, FERC Docket No. FA19-1-000 (Feb. 4, 2022) (DAA Audit Report).

<sup>27</sup> Order No. 90615 at 3 (quoting Order No. 89888).

this erroneous determination because it forecloses on the opportunity to answer the second part of the question—to *what extent* Potomac Edison’s funds were used.

**II. Order No. 90615 errs in concluding that no further investigation and regulatory action is warranted.**

In closing this proceeding, Order No. 90615 concludes that “further discovery in this matter would be unproductive,” and leaves other “outstanding issues” to be addressed in Potomac Edison’s rate case filing in Case No. 9695.<sup>28</sup> These determinations are unsound and rest upon subordinate findings that are factually and legally erroneous.

First, the order finds that the Commission lacks jurisdiction “over FirstEnergy’s misconduct in Ohio, where this scandal occurred.”<sup>29</sup> This finding is used to deny discovery and to conclude that no audit into the practices of FESC relating to Potomac Edison can be had. Second, and relatedly, Order No. 90615 finds that the propriety of Potomac Edison’s regulatory liability and FESC’s charges to Potomac Edison, as well as any necessary related measures, can be addressed in Potomac Edison’s pending rate proceeding, Case No. 9695.<sup>30</sup> But Order No. 90615 fails to explain how review in the rate case will be possible in any meaningful way when the Commission here disclaims jurisdiction over FE/FESC.<sup>31</sup> Third, the Order declines to require the Icahn Group to show cause as to why its right to nominate two board members to the FirstEnergy Board of Directors (and assume other important and unique authorities) does not afford it the

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<sup>28</sup> Order No. 90615 at 22.

<sup>29</sup> *Id.* at 15-16.

<sup>30</sup> *Id.* at 17.

<sup>31</sup> *Id.* at 20.

ability to exercise substantial influence over Potomac Edison.<sup>32</sup> Order No. 90615 instead inexplicably characterizes Icahn’s assumption of authority as “a personnel decision” and a matter “internal” to FirstEnergy. We address each of these points below.

**A. The Commission’s jurisdiction includes authority to safeguard the regulatory process with respect to the witnesses and accompanying evidence that come before it.**

In disclaiming jurisdiction to order the production of information from FirstEnergy or FESC, Order No. 90615 nowhere addresses OPC’s argument that the Commission can do so pursuant to the Maryland Supreme Court’s determination that the Commission can “exert [jurisdiction] over unregulated operations ‘to the extent necessary to assure just and reasonable rates for . . . regulated utility services.’”<sup>33</sup> Of and by itself, Order No. 90615’s failure to address OPC’s argument renders the decision arbitrary and capricious.<sup>34</sup>

The scope of the Commission’s authority to order the production of documents and information from the corporate affiliate of a Commission-regulated entity is informed by the “practical control” doctrine. A party must produce information in discovery that it owns, or that it “has the right, authority, or practical ability to obtain . . . from a non-party.”<sup>35</sup> In determining whether a party has the practical ability to obtain information

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<sup>32</sup> *Id.* at 18.

<sup>33</sup> Post-Discovery Reply Brief of the Maryland Office of People’s Counsel at 7 (OPC Reply Br.), Case No. 9667 at 7 (quoting *Delmarva Power & Light Co.*, 370 Md. 1, *on reconsideration*, 371 Md.356 (2002).

<sup>34</sup> *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency’s “fail[ure] to consider an important aspect of the problem” before it renders its decision arbitrary and capricious).

<sup>35</sup> *Goodman v. Praxair Servs. Corp.* 632 F.Supp.2d 494, 515 (D. Md. 2009). *See* Response of the Office of People’s Counsel to Potomac Edison’s Appeal of Proposed Order No. 89990 at 9-11 (Dec. 6, 2021) (addressing practical control doctrine).

from a non-party, “courts are able to disregard corporate form to prevent . . . misleading actions whereby corporations try to hide documents or make discovery of them difficult.”<sup>36</sup>

The Maryland Supreme Court in *Steele* delineated several factors that may establish that a party has practical control over a document. These include:<sup>37</sup>

(1) the corporate structure of the party/nonparty, (2) the nonparty’s connection to the transaction at issue in the litigation, and (3) the degree that the nonparty will benefit from the outcome of the case. Other relevant factors include whether the related entities exchange documents in the ordinary course of business, and whether the nonparty has participated in the litigation. Common relationships between a party and its related nonparty entity are particularly important to the determination of control. Critical factors here include the ownership of the nonparty, any overlap of directors, officers, and employees, and the financial relationship between the two entities.

The *Steele* factors support a finding that Potomac Edison has practical control over the materials relevant to the issues in this case. FirstEnergy, as the perpetrator of the bribery scandal and director of the internal investigation, and FESC, as the party that imposed charges upon Potomac Edison to pay for FirstEnergy’s criminal activities, have a clear connection to and interest in the transactions under review in this case. Potomac Edison and FESC are wholly owned subsidiaries of FirstEnergy, FirstEnergy executives

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<sup>36</sup> *Steele Software Sys., Corp. v. DataQuick Info. Sys., Inc.*, 237 F.R.D. 561, 564 (D. Md. 2006). Additionally, “[t]he specific form of the corporate relative involved does not matter, i.e., whether it is a parent, sister, or subsidiary corporation.” *Id.*

<sup>37</sup> *Id.* (internal citations omitted).

comprise the Potomac Edison Board of Directors,<sup>38</sup> Potomac Edison provides monetary distributions to FirstEnergy from ratepayer revenues, and the common interplay of FESC and Potomac Edison is manifest. FirstEnergy and FESC have embroiled themselves in this proceeding by, among other things, providing Potomac Edison information concerning the internal investigation that underlies FESC employee Raymond Valdes' calculation of the regulatory liability connected with the HB6 scandal—and have done so knowing that Potomac Edison is using that information to respond to the matters that the Commission has set for discovery. Indeed, every substantive response to OPC and Solar United Neighbors of Maryland's data requests was answered by FirstEnergy and/or FESC employees. Not a single substantive response was provided by a person or persons in the direct employ of Potomac Edison.<sup>39</sup>

The evidence that has come to light in this investigation, and that OPC has brought to the Commission's attention from other investigations, such as the FERC and Ohio audits, fully support the Commission's ability to obtain information from FirstEnergy and FESC under the practical control doctrine and provide compelling reasons to do so. OPC has shown that in addition to the HB6-related charges, FESC routinely charges Potomac Edison hundreds of thousands of dollars for FirstEnergy's political contributions,<sup>40</sup>

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<sup>38</sup> In response to data request OPC-1.43, Potomac Edison stated that as of September 1, 2021, all of the members of the Potomac Edison Board of Directors were officers of FirstEnergy, specifically former CEO Strah, former Vice President Belcher, and current Vice President and CFO Taylor.

<sup>39</sup> Even responses authored by "Counsel" appear to have been crafted by FirstEnergy. Counsel to Potomac Edison Jeffrey Trout's LinkedIn page identifies him as "Senior Corporate Counsel at FirstEnergy Corp." <https://www.linkedin.com/in/jeffrey-trout-3a4a656a/>.

<sup>40</sup> These are charges illegal to seek to recover in rates pursuant to Commission regulation. COMAR 20.07.04.08B. Because the "internal controls" of both FESC and FirstEnergy "hav[e] been possibly

contributions in like amount to Ohio sports team and charitable and religious activities and other non-Maryland related entities, payments to other FirstEnergy affiliates, and millions of dollars in charges for otherwise undefined “Non 3<sup>rd</sup> Party Vendor Activity.”<sup>41</sup> Evidencing FirstEnergy and FESC’s domination and control over Potomac Edison, the utility was unable to identify a single instance where Potomac Edison had disputed a charge assessed by FESC.<sup>42</sup>

Potomac Edison’s lack of oversight of charges imposed by the corporate service company aligns with the evidence OPC submitted in this proceeding from the FERC and the Ohio PUC audits of FirstEnergy and FESC. Those audits found egregious shortcomings in corporate charge and cost allocation practices, including the “lack [of] enough internal controls and oversight regarding the use of cost -allocators and costs allocated to [FirstEnergy’s Ohio distribution utilities] to prevent cross-subsidization,” despite the adoption of FirstEnergy’s Cost Allocation Manual.<sup>43</sup> These findings cannot be reconciled with Order No. 90615’s statement that there is “insufficient evidence” in

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obfuscated or circumvented to conceal or mislead as to the actual amounts, nature, and purpose of the lobbying expenditures made,” (DAA Audit Report at 48) there is no way for OPC – or the Commission – to verify whether the lobbying charges OPC identified in its Initial Brief represent the universe of unaccounted for political and lobbying charges that may be included in Potomac Edison rates.

<sup>41</sup> OPC IB at 25-26; Reply Br. at 3.

<sup>42</sup> OPC IB, Att. A-497 (Response to data request OPC-4.3).

<sup>43</sup> OPC IB at 29 (quoting Ohio audit at 90. *See also* at OPC Reply Br. at 13-14 (identifying FERC and Ohio audit findings of insufficient billing information provided by FESC to FirstEnergy subsidiaries, FESC employee failure to improperly record time spent on lobbying activities, consistent recordation of unrecoverable charitable expenditures above the line, lack of review by subsidiaries of FESC cost allocations, and failure of subsidiary utilities to gain insight into the allocation process or challenge any allocations from FESC).

this proceeding that Potomac Edison ratepayers have not been harmed “beyond those issues already acknowledged by the Company.”<sup>44</sup>

Order No. 90615 nowhere addresses the Commission’s ability to order the production of discovery from FirstEnergy and FESC under the practical control doctrine. In granting Potomac Edison’s appeal and denying OPC’s motion to compel, the Commission ruled that the attorney-client privilege protected the internal investigation materials sought by OPC, and which were the basis for Vice President Mikkelsen’s identification to witness Valdes of the entities/accounts to search to determine the HB6 related charges included in Potomac Edison’s rates.<sup>45</sup> The Commission should reconsider this determination incident to its determination of this motion for reconsideration<sup>46</sup> because, as OPC has previously shown, FirstEnergy and FESC waived any such privilege when it chose to put these matters at issue, under the sword and shield doctrine.<sup>47</sup> In any event, the information that Ms. Mikkelsen provided to Mr. Valdes was a business communication, and thus not a privileged communication.<sup>48</sup> The Commission should

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<sup>44</sup> Order No. 90615 at 1.

<sup>45</sup> Order No. 90033 on Appeal, Case No. 9667 (January 6, 2022) at 10-11.

<sup>46</sup> “Maryland, along with the federal courts and the majority of state courts that have addressed the issue, recognizes the inherent authority of agencies to reconsider their own quasi-judicial decisions.” *Cinque v. Montgomery Cnty. Planning Bd.*, 173 Md. App. 349, 361 (2007).

<sup>47</sup> FirstEnergy’s conduct constitutes a classic violation of the sword and shield doctrine and a waiver of privilege. FirstEnergy, and Ms. Mikkelsen, used the Board of Directors’ internal investigation as the basis for Ms. Valdes’ calculation of Potomac Edison’s regulatory liability, which FESC and Potomac Edison presented, and put at issue in this investigation. A privilege is waived by an affirmative act that “put[s] the protected information at issue by making it relevant to the case” and “application of the privilege would . . . den[y] the opposing party access to information vital to his [case].” *Parler & Wobbler v. Miles & Stockbridge*, 756 A.2d 526, 542 (Md. 2000).

<sup>48</sup> The Office of People’s Counsel’s Motion for Reconsideration of Order No. 90033, and Request for Order Directing Production and For Other Relief, Case No. 9667 (Jan. 13, 2023) (showing that Ms. Mikkelsen’s exchanges with Mr. Valdes concerning the determination of Potomac Edison’s regulatory

order the production of this discovery as necessary to ensure just and reasonable rates, incident to the practical control doctrine, because it is otherwise impossible for the Commission to rely upon Mr. Valdes' calculation of Potomac Edison's regulatory liability as reliable and probative evidence.<sup>49</sup>

Rather than permit a meaningful vetting of Mr. Valdes' calculation of the company's regulatory liability, Order No. 90615 takes it at face value. While the Commission has concluded that "insufficient evidence exists to establish that Potomac Edison's customers have been harmed by FirstEnergy's misconduct in Ohio beyond" the \$38,000 regulatory liability, the reality is that it cannot know whether this is the case because of the Commission's refusal to exercise its jurisdiction to permit discovery into the very matters that FirstEnergy and FESC have injected into this investigation. As OPC noted in its Initial Brief, "[t]he needed data [to assess the validity of Mr. Valdes' calculations] may in fact reside outside of Potomac Edison's files, but that does not mean that the information does not exist."<sup>50</sup> The Commission should change course and find that it possesses the requisite jurisdiction to order the production of documents from FirstEnergy and FESC, and direct that the information be produced. This step is essential

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liability were for business purposes). The Commission did not reach the merits of OPC's reconsideration motion and found that it was procedurally flawed. Order No. 90100 Denying Reconsideration, Case No. 9667 (Mar. 2, 2023) at 3.

<sup>49</sup> See OPC IB at 23 (expert testimony lacking the requisite factual foundation is "mere speculation or conjecture" (quoting *Rockland v. Stevenson*, 471 Md. 1, 21 (2020)). Potomac Edison cannot provide any evidence whether the vendor charges for which Valdes was instructed to search represented the entirety of the improperly classified or inadequately documented funds reflected in Potomac Edison's rates. *Id.* at 22. In fact, as discussed below, documents provided in the Potomac Edison rate Case No. 9695 suggest that Valdes' initial analysis *did not* encompass the entirety of such improper allocations.

<sup>50</sup> OPC IB at 9.

if the Commission and the parties are to ascertain the truth of the information the FE/FESC employees have introduced into this proceeding, and, thereby, to assure just and reasonable rates and safeguard against related wrongdoing going forward.

**B. The misconduct identified in this proceeding is unlikely to be properly remediated through participation in other proceedings.**

Order No. 90615 notes that Potomac Edison witnesses Valdes and Ashton have submitted testimony in Potomac Edison’s pending rate case, Case No. 9695, addressing Potomac Edison’s regulatory liability and measures adopted “to prevent a recurrence of the misallocations addressed in the present case.”<sup>51</sup> The Order finds that these and other related issues “will be addressed in Case No. 9695.”<sup>52</sup> As a threshold matter, OPC does not intend to litigate here matters before the Commission in Case No. 9695. Nevertheless, addressing the failures of Order No. 90615 requires explaining why the promise of adjudication in the pending rate case of the matters at the heart of this proceeding is insufficient relief for the potential customer harms arising from Potomac Edison’s affiliation with FirstEnergy.

The conduct that Potomac Edison, FirstEnergy, and FESC have engaged in here—and that the Commission has thus far countenanced—strikes at the heart of the Commission’s ability to regulate Potomac Edison and protect ratepayers from unjust, unreasonable, or otherwise unlawful rates and charges in *any* proceeding. As discussed above, FirstEnergy and FESC employees appearing on behalf of Potomac Edison (or

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<sup>51</sup> Order No. 90615 at 16.

<sup>52</sup> *Id.* at 22.

sponsoring data responses) present such information as the utility and its parent and affiliate choose to provide. But when OPC seeks to probe the reliability of that information, Potomac Edison is able to hide behind claims of corporate separateness and alleged lack of custody and control. The result is to defeat any ability of OPC and other parties to pursue the data needed to ascertain the reliability of the information that has been presented—as well as the Commission’s own ability to evaluate that data. With the issuance of Order No. 90615, there is every reason to believe that this dynamic will continue in Case No. 9695.

In fact, this expectation has come to fruition, as the same discovery problems at issue here have arisen in the rate case. OPC’s discovery requests in Case No. 9695 concerning Potomac Edison’s regulatory liability, and its self-proclaimed efforts to protect against the recurrence of the inclusion of inappropriate FESC charge allocations in Potomac Edison’s rates, are already being met with the same hide-the-ball objections that Potomac Edison lacks custody and control over the information sought.<sup>53</sup>

OPC’s concern “that FESC is allocating costs to Potomac Edison that have nothing to do with Potomac Edison”<sup>54</sup> is well founded and appropriately within the scope of *this* proceeding. It is in the scope of this proceeding because, in part, Potomac Edison’s numbers in this proceeding are different than those presented in the rate case, and that discrepancy is relevant to FirstEnergy’s exercise of control over Potomac Edison—the

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<sup>53</sup> Letter to Public Utility Law Judge Grace from Irene Wiggins, Assistant Peoples Counsel, Motion to Compel, at 2-3, *The Potomac Edison Company’s Application for Adjustments to its Retail Rates for the Distribution of Electric Energy*, Case No. 9695 (filed Mar. 25, 2023).

<sup>54</sup> Order No. 90615 at 17.

heart of *this* proceeding. Specifically, Potomac Edison submitted the testimony of witness Valdes in support of its application to increase rates in Case No. 9695. Mr. Valdes explains that “FirstEnergy performed additional reviews of certain non-operating or non-recoverable costs, including costs associated with advertising, sponsorships, competitive services, and lobbying, and identified certain costs that were recorded to utility operating accounts that were also included in customer rates.”<sup>55</sup> As a result of this review, Potomac Edison’s proposed regulatory liability has expanded dramatically:

Once the timespan since the test year and interest is applied, the total refunds to customers equal \$1,668,447 – of which \$207,363 (12%) represents the amount discussed in Case No. 9667, \$1,083,418 (65%) represents sponsorships and advertisement, and \$377,666 (23%) represents miscellaneous[.]<sup>56</sup>

The rate case does not provide adequate opportunity to investigate why the amounts associated with these “additional reviews” were not reflected in the original analysis performed by Valdes in Case No. 9667 because Potomac Edison continues to refuse to provide sufficient information about the FirstEnergy analysis that revealed the initial misallocations. The “additional reviews” included in the rate case call into question the accuracy of Potomac Edison’s original representations to the Commission in this case about the extent of the impact of the HB6 scandal on Maryland ratepayers.<sup>57</sup> Absent

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<sup>55</sup> Valdes Direct Testimony at 28, Case No. 9695 (filed Mar. 22, 2023).

<sup>56</sup> *Id.* at 30.

<sup>57</sup> Potomac Edison has disclosed additional information, including some related to the vendors included in Valdes’ original analysis, in response to discovery requests in Case No. 9695. Pursuant to OPC’s protective agreement with Potomac Edison, without a Commission order instructing otherwise the information can only be used in that case.

proper discovery, there is no way to know if these figures are accurate. The Commission must address this serious concern by extending the investigation in this case.

Equally important are Order No. 90615's implications for the integrity of Commission proceedings. While punting the matters at issue here to the rate case, Order No. 90615 implicitly grants a license to the utility and its affiliates to defy the fairness of the litigation process, and the utility's actions will be repeated in other dockets unless the Commission puts a stop to it. Fairness demands that Potomac Edison's witnesses, as well as the individuals who sponsor data responses on behalf of the company, be subject to meaningful discovery, including as appropriate discovery into information located – and concealed elsewhere – within FirstEnergy and FESC.<sup>58</sup>

In a related vein, Order No. 90615 declines to expand the Commission's investigation into FirstEnergy and FESC, or direct Potomac Edison to perform an independent shareholder-funded audit into FESC's imposition of charges on Potomac Edison. According to the Commission, these are matters appropriately left for other "authorities includ[ing] the U.S. Department of Justice, FERC, the SEC, . . . the Attorney General in Ohio, and the Public Utilities Commission of Ohio."<sup>59</sup> None of those entities is charged with protecting Potomac Edison's residential customers. The Commission is the entity with the authority and obligation to ensure that Potomac Edison's retail electric service is just, reasonable, and otherwise lawful, and it cannot abdicate that

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<sup>58</sup> FirstEnergy's tactics to conceal critical information are not unique to this proceeding in Maryland. In December 2022, FERC levied a fine of \$3.8 million on FirstEnergy because it violated FERC's duty of candor rule by concealing materials from the Division of Audits and Accounting. *See* Order Approving Stipulation and Consent Agreement, FERC Docket No. IN23-2-000 (Dec. 30, 2022).

<sup>59</sup> Order No. 90615 at 15-16.

responsibility. Potomac Edison, FirstEnergy, and FESC have put these matters at issue by providing their calculation of the regulatory liability associated with the HB6 scandals, and this investigation has shown that there are inadequate controls concerning FESC and Potomac Edison to protect customers from improper charges.

Independent of any jurisdictional concerns, the Commission has taken no action to protect Potomac Edison's customers based upon the publicly available information that has come to light in these proceedings, and the commitments that FirstEnergy has made to other authorities. As part of the DPA, FirstEnergy committed, among other things that:

4. FirstEnergy Corp. will ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts. This system should be designed to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets.

5. FirstEnergy Corp. will ensure that all contributions made to entities incorporated under 26 U.S.C. § 501(c)(4) ("501(c)(4)" entities) and all payments to entities operating for the benefit of a public official, either directly or indirectly, are reviewed and approved by a compliance officer trained to ensure such payments comport with company policy and U.S. law. In addition, the amount, beneficiary, and purpose of all such contributions and payments must be reported to the Board on a quarterly basis.

6. FirstEnergy Corp. will ensure that lobbying and consultant contracts are reviewed and approved by a compliance officer trained to evaluate whether the purpose of the contracts and payments made pursuant to the contracts comport with company policy and U.S. law.

7. FirstEnergy Corp. will ensure that its written compliance code prohibits billing and payment practices used to subvert internal controls.<sup>60</sup>

Although each of these commitments appear to be steps in the right direction, directly related to safeguarding against the recurrence of the improper charges at issue here, the Commission has closed this proceeding without even asking Potomac Edison what, if anything, FirstEnergy has done to satisfy these obligations as they pertain to Potomac Edison customers.

As discussed above, and in OPC's Reply Brief, the FERC and Ohio audits have identified a litany of problems with respect to FESC's charge practices concerning FirstEnergy's distribution utilities. These include findings of insufficient billing information provided by FESC to FirstEnergy subsidiaries, FESC employee failures to record time spent on lobbying activities properly, consistent recordation of unrecoverable charitable expenditures above the line, lack of review by subsidiaries of FESC cost allocations, lack of enough internal controls and oversight regarding the use of cost-allocators and costs allocated to FirstEnergy's Ohio distribution utilities to prevent cross-subsidization, and failure of subsidiary utilities to gain insight into the allocation process or challenge any allocations from FESC.

In the time since parties filed briefs in this case, several other jurisdictions have also taken significant steps to investigate FirstEnergy's misconduct on behalf of their ratepayers. The New Jersey Board of Public Utilities (NJBPU) ordered an intensive third-

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<sup>60</sup> DPA, Att. B, Corporate Compliance Program at 47-48.

party audit of FirstEnergy’s affiliate in New Jersey. Notably, the auditor documented “an extraordinary lack of transparency in response to requests for information about internal audits,” and stated that “[t]his lack of transparency exceeds what we have seen across three decades of similar inquiries, and it hindered our ability to address significant aspects of our engagement scope.”<sup>61</sup> The NJBPU opened a docket to address all of the recommendations of the auditor, including those related to FirstEnergy’s lack of cooperation.

The West Virginia Public Service Commission (WVPSC) has also issued an RFP for external auditors to review lobbying expenditures by its FirstEnergy affiliates, Potomac Edison and Monongahela Power Company, despite those companies having an open rate case. The WVPSC recognized that the scope of the needed investigation could not be limited to the rate case.<sup>62</sup>

The FERC, Ohio, and New Jersey audit findings comport with the evidence that OPC has provided in this proceeding specific to FESC’s charge practices with respect to Potomac Edison. This state of affairs is likely to result in unjust, unreasonable, and improper charges to Potomac Edison ratepayers, and the improper use of ratepayer funds, unless remediated. The relationship between FESC and Potomac Edison is profoundly flawed in ways inimical to Potomac Edison customer interests. Rather than closing this investigation, the Commission should take the necessary pro-active measures to ensure

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<sup>61</sup> See Final Report—Executive Summary Phase Two of an Audit of the Affiliated Transactions and Management Audit of Jersey Central Power & Light Co., NJBPU Docket No. EA20110733 (Feb 7, 2023) at ES 16.

<sup>62</sup> See Commission Order, WVPSC Case No. 23-0270-E-GI (April 10, 2023).

adequate FESC and Potomac Edison implement adequate safeguards to correct these wrongs.

**C. The Commission should order FirstEnergy and Potomac Edison to show cause why the Icahn Agreement should not be subject to Section 6-105 of the Public Utilities Act.**

Order No. 90615 declines to find that the Icahn Group has obtained the ability to exercise substantial influence over Potomac Edison pursuant to the provisions of the Icahn Agreement, notwithstanding that it provides for the two Icahn-appointed directors the power to vote on the FirstEnergy Board of Directors. The Order finds that the Icahn Agreement is an “internal,” “personnel matter,” outside of the purpose of PUA § 6-105 “to safeguard utilities from financially risky outside influences.”<sup>63</sup> These findings represent an unexplained departure from Commission precedent, ignore the record evidence that the Icahn-appointed directors possess the ability to exercise substantial influence over Potomac Edison, and cannot be reconciled with the broad remedial purpose of the statute.

In a case where a company—EDF—was alleged to have gained substantial influence over BGE through a transaction with BGE’s parent, the Commission held that of and by itself, “[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]” within the meaning of PUA § 6-105.<sup>64</sup> Although Order No. 90615 seeks to distinguish the *EDF* holding based on its *additional*

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<sup>63</sup> Order No. 90615 at 18.

<sup>64</sup> Order No. 82719 *In the Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Company (“EDF”)*, Case No. 9173 (June 11, 2009) at 31.

findings related to EDF’s abilities to exercise substantial influence over the regulated utility,<sup>65</sup> those additional findings do not detract from the *EDF* decision’s finding regarding rights to nominate directors. The Commission’s *EDF* order found that the power to exercise substantial influence inheres in the investor’s right to board of director membership—separate and apart from all other considerations. “[T]he power to exercise substantial influence here [over the subsidiary utility arises] not from any direct leverage [the investor] could assert vis-à-vis [the regulated utility], but from [the investor and its board member’s] ability to influence decisions [the parent holding company] might make regarding the allocation of capital within [the holding company].”<sup>66</sup> The very same is true with respect to FirstEnergy: the FirstEnergy Board is the ultimate arbiter of capital allocation within the holding company and thus with respect to Potomac Edison.

OPC showed in its Initial Brief, and it is uncontroverted, that the Icahn-appointed directors have exercised substantial influence over FirstEnergy by using board committee powers that have led to six former Board members stepping down and a reduction in the size of the FirstEnergy Board from sixteen to ten members<sup>67</sup> and that the Icahn-appointed directors possess special powers not enjoyed by other board members. Pursuant to the Icahn Agreement, FirstEnergy cannot form an Executive Committee without including an Icahn-appointed director, and Icahn-appointed directors must participate in

any Board consideration of appointment and employment of  
named executive officers, mergers and acquisitions of

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<sup>65</sup> Order No. 90615 at 21.

<sup>66</sup> Order No. 82719 at 34.

<sup>67</sup> OPC IB at 42-44. *See also*

[https://firstenergycorp.com/investor/corporate\\_governance/board\\_of\\_directors.html](https://firstenergycorp.com/investor/corporate_governance/board_of_directors.html) (identifying the ten members of FirstEnergy’s current Board of Directors).

material assets, or dispositions of material assets, or similar business combination transactions, such voting with respect thereto shall take place only at the full Board level or in Board committees of which one of the Icahn Designees is a member[.]<sup>68</sup>

The HB6 scandals make clear the import of FirstEnergy executive officer hirings and the potential impact of their actions on Potomac Edison. Potomac Edison has acknowledged that “no other member of the FE Board has similar written commitments.”<sup>69</sup>

Order No. 90615’s efforts to cabin the reach of PUA § 6-105 as a provision “to safeguard utilities from financially risky practices” cannot be reconciled with the expansive language of the statute, which is intended to protect against the “acqui[sition of] the power to exercise any substantial influence over the policies and actions of a public service company that provides electricity or gas in the State [that] could result in harm to the customers of the public service company.”<sup>70</sup> In Order No. 82719, the Commission emphasized EDF’s financial strength, but nevertheless found, as noted above, that the transaction would afford EDF the ability to exercise substantial influence over BGE by means of its obtaining a seat on its parent’s board of directors and potentially adversely impacting BGE by influencing capital expenditures with respect to BGE.

In a case that should guide the Commission’s decision in this proceeding and is consistent with the Commission’s findings in *EDF*, FERC has recently found that the

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<sup>68</sup> OPC IB, Att. A-13, Icahn Agreement, ¶ 1.a(xi).

<sup>69</sup> Response to OPC DR No. 1.19.

<sup>70</sup> PUA § 6-105 (b)(1)(ii).

appointment of an individual accountable to an investor to the board of a public utility holding company gives the investor influence over significant decisions of the public utility, regardless of the amount of company shares held by that investor. Specifically, FERC determined that “where an investor’s non-independent director, such as... [an] appointee accountable to an investor, is appointed to the board of a public utility or public utility holding company, the appointment functions to rebut the presumption of lack of control [due to that investor holding less than 10% of the utility’s voting shares].”<sup>71</sup> FERC found that simply through the presence of an investor’s appointee on a board of directors, the “investor itself will have...rights, privileges, and access, and thus the authority to influence significant decisions” of the utility.<sup>72</sup> Thus, the presence of two Icahn Group employees, designated by and under the control of the Icahn Group, on the FirstEnergy board is enough to pursue the question of whether the Icahn Group has obtained substantial control over Potomac Edison through its influence of FirstEnergy.

At paragraph 54, Order No. 90615 correctly rejects Potomac Edison’s timing argument that PUA § 6-105 does not apply because FirstEnergy and the Icahn Group apparently entered into the Icahn Agreement immediately following, and not directly incident to the Icahn Group’s acquiring 3.5 percent of FirstEnergy’s common stock.

[T]he Commission finds irrelevant whether the Icahn 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

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<sup>71</sup> 181 FERC ¶ 61,044, Order on Notice of Change in Status, Docket No. ER20-67-001 (Oct. 20, 2022) at 15.

<sup>72</sup> *Id.*

Commission discretion to determine when an incremental increase in that discretion becomes substantial.<sup>73</sup>

Nevertheless, elsewhere in the Order, the Commission emphasizes the very point it initially deems irrelevant: that “[t]he 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.”<sup>74</sup> Potomac Edison’s timing argument is unavailing because Icahn’s conduct makes clear that he achieved his goal to buy into the company and secure seats on the FirstEnergy Board in a single transaction through the Icahn Agreement.<sup>75</sup>

Order No. 90615’s dismissal of the Icahn Group’s acquisition of two FirstEnergy board seats as an internal personnel matter is misguided. As discussed above, PUA § 6-105 reaches all manner of acts by which a utility affiliate acquires the ability to exercise substantial influence over a Maryland regulated electric utility such as Potomac Edison. Importantly, PUA § 6-105 is prophylactic in nature. It is not a ham-fisted measure intended to block all subject transactions and prohibit the seating of certain board members. Rather, the Commission enjoys substantial conditioning authority as a first line of defense.<sup>76</sup>

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<sup>73</sup> Order No. 90615 at 18.

<sup>74</sup> *Id.* at 20.

<sup>75</sup> *See* OPC IB at 35-36.

<sup>76</sup> “The Commission may condition an order authorizing the acquisition on the applicant’s satisfactory performance or adherence to specific requirements.” PUA § 6-105 (g)(3)(ii).

Order No. 90615 incorrectly finds that the current ring-fencing measures that are in place with respect to Potomac Edison and FirstEnergy are adequate to protect Potomac Edison from the Icahn-appointed directors’ and thus Icahn Group’s ability to exercise substantial influence over the company.<sup>77</sup> This investigation has made plain that new structural safeguards are necessary to protect Potomac Edison and its customers from being subject to improper and unlawful charges, and the FirstEnergy Board of Directors bears the ultimate responsibility to ensure that such safeguards are implemented. The Commission has no ability to know whether FirstEnergy and FESC are taking the necessary measures without adequate insight into Potomac Edison’s parent corporation and affiliate(s). Incident to a PUA § 6-105 proceeding, FirstEnergy and FESC could be directed to modify the ring-fencing measures to provide the Commission, Staff, and OPC access to FirstEnergy’s and FESC’s books, records, and information as necessary and appropriate for purposes of protecting Potomac Edison’s customers and ensuring the provision of just, reasonable, and otherwise lawful rates, services, and charges.<sup>78</sup>

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<sup>77</sup> Contrary to this Commission’s conclusions about the adequacy of Potomac Edison’s ring-fencing measures, the New Jersey auditors found “existing ring-fencing ineffective in protecting” FirstEnergy’s New Jersey subsidiary. *See* Final Report—Executive Summary Phase One of an Audit of the Affiliated Transactions and Management Audit of Jersey Central Power & Light Co., NJBPU Docket No. EA20110733 (Feb 7, 2023) at ES 17.

<sup>78</sup> The Commission conditioned its approval of AltaGas’s acquisition of Washington Gas upon a kindred provision, requiring “AltaGas, its affiliates, and its subsidiaries [to] agree to submit to the jurisdiction of the Commission for . . . (2) matters relating to affiliate transactions between Washington Gas and AltaGas or its affiliates to the extent relevant to operations of Washington Gas in Maryland.” Order No. 88631, App. A., A-10, Commitment 19 (Apr. 4, 2018).

## CONCLUSION

For the foregoing reasons, and the reasons set forth in OPC's Initial and Reply Post-Discovery Briefs, the Commission should grant this motion and vacate Order No. 90615. There is a sufficient evidentiary basis to support the Commission taking the following actions, as initially requested in OPC's Initial Post-Discovery Brief:

1. Broaden the scope of the investigation to include FirstEnergy and FESC, permit discovery requests concerning the issues set for investigation, and follow the period of discovery by establishing hearing procedures.
2. Order FirstEnergy and Potomac Edison to show cause as to why the Icahn Agreement should not be subject to Section 6-105 of the Public Utilities Article.
3. Direct that all refund reports, related analyses, or other documents provided to FERC in response to the DAA audit, and which concern the FirstEnergy distribution utilities, must also be provided to the Commission and made available for review in this proceeding.
4. Direct that the results of all investigations of the conduct of FirstEnergy that led to this proceeding be submitted to the Commission and be made available to the public for review and comment.
5. Direct that Potomac Edison report to the Commission on the controls it has implemented to ensure that, going forward, there is full and independent review of all charges imposed by FESC.
6. Direct that Potomac Edison perform an independent and shareholder-funded audit of all charges imposed on Potomac Edison by FESC, and submit that audit to the Commission.

OPC respectfully requests that the Commission issue a new order providing this relief in order to protect the interests of Potomac Edison's Maryland customers.

(continued for signatures)

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of June, 2023, the foregoing Motion for Rehearing of Order No. 90615 was e-mailed to all parties of record to this proceeding.

Respectfully submitted,

/electronic signature/  
Irene N. Wiggins  
Assistant People's Counsel