IN THE CIRCUIT COURT FOR BALTIMORE CITY

IN THE MATTER OF THE PETITION OF THE MARYLAND OFFICE OF PEOPLE'S COUNSEL	* * * * *	**Civil Case No. 24-c-23-003077**

MEMORANDUM OF PETITIONER MARYLAND OFFICE OF PEOPLE'S COUNSEL

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INTRODUCTION

The Maryland legislature enacted Public Utilities Article ("PUA") Section 6-105 to ensure that individuals not engaged in the public utility business are unable to acquire "the power to exercise any substantial influence over the policies and actions of a [Maryland] public service company" absent Public Service Commission ("PSC") approval.[1] This appeal concerns the PSC's failure to fulfill its responsibilities under this statute.

In 2021, FirstEnergy Corporation ("FirstEnergy"), weakened by the financial fallout that followed its having admitted to bribing public officials to secure beneficial legislation, avoided a proxy fight by cutting a deal with "activist investor" Carl Icahn, FirstEnergy's new, large shareholder. Through the agreement with FirstEnergy, Mr. Icahn obtained the right to appoint to the FirstEnergy board two directors who would have unique corporate governance rights. This arrangement afforded Mr. Icahn and his Board designees the ability to exercise "substantial influence" over FirstEnergy, and, by extension, over its wholly-owned subsidiary, Potomac Edison, a regulated Maryland public utility.

The Office of People's Counsel ("OPC"), the State's residential customer advocate, asked the PSC to investigate the impact of Mr. Icahn's agreement on Potomac Edison customers and determine whether the agreement required PUA § 6-105 approval. The PSC opened an investigation but closed it after finding that the agreement concerned

[1] Md. Code. Ann., Pub. Util. § 6-105(b)(1)(ii).

an "internal matter" and a "personnel decision" that did not trigger the statute's protections. The PSC's decision was contrary to the statute, uncontroverted evidence, and the PSC's own precedent. OPC here asks this Court to reverse the PSC's decision.

STATEMENT OF THE CASE

OPC seeks judicial review of PSC Order No. 90681, which upheld PSC Order No. 90615 terminating, without an evidentiary hearing and over the objections of OPC and other parties, a limited investigation that the PSC initiated in response to a petition filed by OPC.[2] This appeal focuses on one of the issues set for investigation: whether the March 16, 2021, "Director Appointment and Nomination Agreement" between FirstEnergy and the "Icahn Group" ("Icahn Agreement"),[3] which authorizes it to designate two directors to the FirstEnergy board of directors and exercise other governance rights, is subject to PUA § 6-105. The PSC erred in concluding that the Icahn Agreement fell outside the ambit of PUA § 6-105. OPC here seeks reversal of that determination, and a directive to the PSC that it conduct an evidentiary proceeding to

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[2] Dkt. No. 1, Petition of the Office of People's Counsel to Investigate the Future of FirstEnergy's Relationship with Potomac Edison in Light of Recent Events (May 11, 2021) ("OPC Petition"); Dkt. No. 52, Order No. 90615 on Investigation (May 5, 2023) ("Order No. 90615"); Dkt. No. 57, Order No. 90681 on Order Denying Rehearing (June 23, 2023) ("Order No. 90681"). Because the PSC's order denying rehearing relies in part on its earlier order, this brief hereafter uses the term "Orders."

[3] Potomac Edison filed a copy of the Icahn Agreement with the PSC on March 31, 2021. Maillog #234527, Letter from Jeffrey P. Trout counsel to Potomac Edison to Andrew Johnson, Executive Secretary Maryland Public Service Commission, App. A, Icahn Agreement (Mar. 31, 2021). The same letter was also attached to a FirstEnergy SEC Form 8-K indicating the effective date of the Board memberships of the Icahn Director-designees. A copy of these documents, including the Icahn Agreement, are included in Dkt. No. 42, Initial Post-Discovery Brief of the Office of the People's Counsel (Feb. 18, 2022) ("OPC IB") at Appendix A, beginning at A-1. For the convenience of the Court, a copy of the Icahn Agreement is included as an Appendix to this Initial Brief.

determine whether the Icahn Agreement should be approved as consistent with the dictates of PUA § 6-105.[4]

QUESTION PRESENTED

Did the PSC err in concluding that the Icahn Agreement did not give Icahn Group-designees to the FirstEnergy board of directors the ability to exercise "substantial influence" over Potomac Edison as set forth in PUA § 6-105?

STATEMENT OF FACTS

The fundamental facts are not in dispute.

A. FirstEnergy's criminal conduct and the Icahn Agreement

FirstEnergy acknowledged in a July 21, 2021, "Deferred Prosecution Agreement" with the United States Attorney's Office for the Southern District of Ohio that during a period beginning in 2016 and continuing until roughly February 2020, FirstEnergy engaged in criminal behavior involving, among other things, "conspir[ing] with public officials and other individuals and entities to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy Corp.'s benefit."[5] Specifically, FirstEnergy admitted that it paid roughly $60 million to "Generation Now," a 501(c)(4) organization purportedly controlled by the then-Speaker

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[4] The other two issues addressed in the PSC Orders before the Court concern the rate impacts of FirstEnergy's illegal conduct on Potomac Edison customers. The PSC suggested in the orders on review that OPC pursue its rate-related concerns in a pending Potomac Edison rate case, PSC Case No. 9695. OPC has done so, and is not seeking judicial review in this appeal of these other two issues.

[5] *United States of America v. FirstEnergy Corp.*, Deferred Prosecution Agreement at 17, Case No. 1:21-cr-86 (S.D. Ohio 2021) ("DPA"). The quoted passage is part of a "Statement of Facts" that begins with the assertion that: "*The United States and FirstEnergy Corp. stipulate and agree that if this case proceeded to trial, the United States would prove the facts set forth below beyond a reasonable doubt.*" *Id.* at 14 (emphasis added).

of the Ohio House of Representatives, Larry Householder, in exchange for his assistance in securing the passage of a $1.3 billion bailout bill (known as "House Bill 6" or "HB6") that benefitted two FirstEnergy nuclear plants and paid some $4.3 million to the former Chair of the Ohio Utilities Commission for official actions supporting FirstEnergy's nuclear and other regulatory priorities.

FirstEnergy's stock price fell substantially following the indictment of Mr. Householder[6] and revelation of the HB6 bribery scandal,[7] and its credit rating was reduced to junk bond status.[8] Then, on February 16, 2021, Carl Icahn, described in the press as "a billionaire activist investor famous for hostile takeovers and shaking up corporate boards," announced his intention to purchase "between $184 million and $920 million in FirstEnergy stock."[9] Sometime shortly thereafter, Mr. Icahn threatened to engage in a proxy fight with FirstEnergy unless he was able to secure representation on the company's board of directors. Less than a month after Mr. Icahn announced his

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[6] Mr. Householder was arrested and charged on July 21, 2020. OPC IB at 31 n.54 (citing *Ohio House Speaker, former chair of Ohio Republican Party, 3 other individuals & 501(c)(4) entity charged in federal public corruption racketeering conspiracy involving $60 million* (July 21, 2020), https://www.justice.gov/usao-sdoh/pr/ohio-house-speaker-former-chair-ohio-republican-party-3-other-individuals-501c4-entity.) He was subsequently convicted and sentenced to 20 years in federal prison. *Former Ohio House Speaker sentenced to 20 years in prison for leading racketeering conspiracy involving $60 million in bribes* (June 29, 2023), https://www.justice.gov/usao-sdoh/pr/former-ohio-house-speaker-sentenced-20-years-prison-leading-racketeering-conspiracy.

[7] OPC IB at 31 n.55 (citing Mathew Fox, *FirstEnergy plummets 45% in 2 days after investigators tie it to $60 million bribery scheme that just led to the arrest of Ohio House Speaker*, Business Insider (July 22, 2020), https://markets.businessinsider.com/news/stocks/firstenergy-stock-price-alleged-million-bribery-scheme-ohio-house-speaker-2020-7-1029421615).

[8] OPC IB at 31 n.56 (citing Andy Chow, *FirstEnergy Credit Ratings Downgraded to Junk Status*, The Statehouse News Bureau (Nov. 25, 2020), https://www.statenews.org/government-politics/2020-11-25/firstenergy-credit-ratings-downgraded-to-junk-status).

[9] OPC IB at 31 n.57 (citing Jim Mackinnon, *Billionaire activist Carl Icahn's purchase of FirstEnergy stock could lead to utility's sale, analyst says*, Akron Beacon Journal (Feb. 18, 2021), https://www.beaconjournal.com/story/news/2021/02/18/activist-investor-icahn-buying-significant-amount-firstenergy-stock/4492146001/).

intended purchase, FirstEnergy capitulated to his demands.[10] On March 16, 2021, FirstEnergy and the Icahn Group[11] entered into the Icahn Agreement. FirstEnergy agreed to (1) give the Icahn Group, which owned approximately 3.5 percent of FirstEnergy's outstanding shares,[12] the right to nominate two persons to membership on the company's board of directors; and (2) provide the Icahn directors additional governance rights not enjoyed by any other FirstEnergy board member.[13] Pursuant to these agreements, FirstEnergy named the Icahn directors to the FirstEnergy board of directors effective March 18, 2021.[14] As board members, the Icahn-designees are able to weigh in and vote on every decision that comes before the board, including matters directly material to Potomac Edison, such as capital expenditures.

B. OPC's petition for an investigation

OPC responded to these events by asking the PSC to initiate an investigation into the impact of FirstEnergy's HB6 scandal and its precarious financial position upon

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[10] *See* Icahn Agreement ¶ 1(a)(v) ("The Icahn Group agrees not to conduct a proxy contest or engage in any solicitation of proxies, regarding any matter, including the election of directors, with respect to the 2021 Annual Meeting.").

[11] The Icahn Group consists of Carl C. Icahn, Andrew Teno, Jesse Lynn, Icahn Partners LP, Icahn Partners Master Fund LP, Icahn Enterprises G.P. Inc., Icahn Enterprises Holdings L.P., IPH GP LLC, Icahn Capital LP, Icahn Onshore LP, Icahn Offshore LP, and Beckton Corp. Icahn Agreement, Schedule A. Andrew Teno and Jesse Lynn are the current Icahn Directors.

[12] *See* Icahn Agreement ¶ 7 (stating the "Icahn Group collectively beneficially owns, an aggregate of 18,967,757 Common Shares"). Pursuant to ¶ 1(a)(xv) of the Icahn Agreement, the two Icahn directors were each required individually to purchase 100 shares of FirstEnergy stock incident to their becoming FirstEnergy Board members, and have in fact done so. OPC IB at 31 n.57 (citing Jim McKinnon, *Icahn's FirstEnergy directors now shareholders in Akron utility*, Akron Beacon Journal (Mar. 26, 2021), https://www.beaconjournal.com/story/business/2021/03/26/new-icahn-directors-now-shareholders-akrons-firstenergy-corp/7011810002/). At the time of OPC's petition, this investment had a market value of around $707 million. OPC Petition at 22.

[13] *See* Icahn Agreement at ¶ 1(a)(xi).

[14] FirstEnergy appointed Icahn nominees Andrew Teno and Jesse Lynn to the board. OPC IB at A-1 through A-2.

Potomac Edison ratepayers.[15] OPC's petition included a request that the PSC review the Icahn Agreement and pointed to PUA § 6-105(e)(1), which provides that:

> Without prior authorization from the Commission, a person may not acquire, directly or indirectly, the power to exercise any substantial influence over the policies and actions of an electric company, gas and electric company, or gas company, if the person would become an affiliate of the electric company, gas and electric company, or gas company as a result of the acquisition.

OPC argued that the statute required PSC authorization of the Icahn Agreement because the Icahn Group's investment in FirstEnergy made it an "affiliate" of Potomac Edison and the agreement enabled Icahn to exercise "substantial influence" over the utility.[16]

OPC explained that the Icahn designees would occupy two seats on the board of directors of a holding company that owns and controls a Maryland utility—itself a right that the PSC had previously found enables a holding company investor to exercise substantial influence over a subsidiary utility.[17] In addition, the Icahn Agreement prohibits the FirstEnergy board from forming any new executive committees without approval of both Icahn designees.[18] And, with limited exception, at least one Icahn Designee must be given a seat on any non-executive committee that is formed.[19] No other member of the FirstEnergy board possesses similar governance rights.[20]

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[15] OPC Petition at 20.
[16] OPC Petition at 23.
[17] *In the Matter of the Current and Future Financial Condition of BGE*, Case No. 9173, Order No.82719 (2009) ("Order No. 82719" or "*EDF* Order").
[18] Icahn Agreement ¶ 1(a)(xi); OPC Petition at 21.
[19] Icahn Agreement ¶ 1(a)(xi); OPC Petition at 21.
[20] OPC IB at 45 (citing response to OPC DR No. 1.19).

OPC went on to explain that one of the Icahn Director-designees will "serve as a member of the board's audit committee and its sub-committee overseeing the assessment and implementation of potential changes in FirstEnergy's compliance program."[21] The audit committee charter states its purpose:[22]

> To assist the Board with oversight of: (a) The integrity of the Company's financial statements; (b) The Company's compliance with legal, risk management and regulatory requirements; (c) The independent auditor's qualifications and independence; (d) The performance of the Company's internal audit function and independent auditor; and (e) The Company's systems of internal control with respect to the accuracy of financial records, adherence to Company policies and compliance with legal and regulatory requirements.

Thus, as OPC explained, an Icahn Director would be playing a significant role in future changes to FirstEnergy's compliance culture in response to the racketeering conspiracy.

C. PSC action on OPC's petition

On July 26, 2021, the PSC issued Order No. 89888, in which it granted OPC's Petition, in part, opening an investigation into three "issues that either impact Potomac Edison directly, or have a non-minimal likelihood of impacting Potomac Edison."[23] The issues included:[24]

> 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.

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[21] OPC Petition at 21 (citing FirstEnergy SEC Form 8-K (Mar. 16, 2021).
[22] OPC Petition at 21 (quoting Charter of the Audit Committee, https://www.firstenergycorp.com/content/dam/investor/files/policies-charters/board-charters/Audit-Charter.pdf).
[23] Dkt. No. 8, Order No. 89888 – Order Granting, in Part, OPC Petition for First Energy Investigation ¶ 18 (July 26, 2021) ("Order No. 89888").
[24] Order No. 89888 ¶ 18.

The PSC established a four-month discovery period.[25] The PSC did not require FirstEnergy, the Icahn Group, or the Icahn Directors to participate in the investigation, and none of them intervened in the proceeding.

The PSC did not schedule an evidentiary hearing, but stated:[26]

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

D. OPC's efforts to obtain information during the investigation

OPC sought through discovery to obtain information concerning the negotiation and implementation of the Icahn Agreement. With limited exception, these efforts were unsuccessful.[27] Nevertheless, the combination of public information and limited data produced in discovery demonstrate that the Icahn and the Board designees have acquired substantial influence over Potomac Edison.

OPC explained in briefs submitted at the conclusion of the discovery period[28] that pursuant to the Icahn Agreement: (1) FirstEnergy appointed two Icahn directors to

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[25] Order No. 89888 ¶ 18.

[26] Order No. 89888 ¶ 19. Several parties intervene in the proceeding: Montgomery County, Maryland, Solar United Neighbors of Maryland ("SUN"), and Interstate Gas Supply, Inc. d/b/a IGS Energy and Vistra Corp. ("Interstate Gas Supply"). The PSC issued Order No. 89930 granting SUN's intervention request, over Potomac Edison's objection. Dkt. No. 17, Order No. 89930 – Order Granting Motion to Intervene (Sept. 3, 2021) ("Order No. 88930"). Montgomery County's motion, which was not opposed, was granted through a separate Notice. Dkt. No. 23, Grant of Petition to Intervene (Nov. 3, 2021). The PSC acknowledged Interstate's party status in Order No. 90615 at 14.

[27] OPC's efforts to compel discovery concerning these matters were generally unsuccessful. The PSC limited OPC to discovery from Potomac Edison. Order No. 89888 ¶ 18. In Dkt. No. 25, Order No. 89990 – Proposed Order of Commissioner Linton (Nov. 18, 2021) ("Order No. 89990"), a Commissioner sitting by designation issued a proposed order limiting OPC's rights to the production of documents concerning the Icahn Agreement that "relate to Potomac Edison and are in Potomac Edison's possession." *Id.* ¶ 22.

[28] OPC submitted an Initial (Dkt. No. 42; errata in Dkt. No. 43) and a Reply (Dkt. No. 46) Post-Discovery Brief. OPC included a substantial appendix of supporting evidence with its Initial Brief.

FirstEnergy's board of directors; (2) FirstEnergy supported the Icahn Directors for election to the board following the expiration of their initial term of appointment; and (3) both were elected to the board.[29] As board members they had access to internal corporate information and the highest-level corporate plans; the ability to lobby other board members with respect to corporate policies and plans; and could vote on matters before the board, including matters fundamental to the operation and financing of FirstEnergy, and its subsidiaries.[30]

In addition, the Icahn board-designees possess unique governance rights. FirstEnergy cannot form an executive committee without including an Icahn Director, and Icahn Directors must participate in any board consideration of the employment of executive officers and any fundamental corporate reorganizations.[31] Potomac Edison acknowledged in discovery that no other member of the FirstEnergy board has similar written commitments.[32]

OPC also highlighted paragraph 1(a)(ii) of the Icahn Agreement, which provides that as long as an Icahn Director serves on the FirstEnergy board, the Icahn Group "agree[s] that none of them or any of their Affiliates or Associates (each as defined below) will exercise, or take any action that would constitute exercising, substantial

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[29] OPC IB at 32. OPC explained that the Icahn Group became "affiliated" with FirstEnergy when it acquired nearly 19 million shares of FirstEnergy's stock. "Section 6-105 provides that "affiliate" has the meaning stated in [PUA] § 7-501," which broadly encompasses "a person that . . . has . . . any economic interest in another person." *Id.* at 35-36.
[30] Dkt. No. 46, Post-Discovery Reply Brief of the Maryland Office of People's Counsel (Mar. 28, 2022), ("OPC Reply Brief").
[31] Icahn Agreement ¶ 1(a)(xi).
[32] OPC IB at 45 (quoting Response to OPC DR No. 1.19).

influence or control over the Company or any of its subsidiaries."[33] OPC pointed out that this highly unusual provision—itself a tacit admission that the Icahn Group possesses the ability to exercise substantial influence—had no evident purpose other than to try and assuage concerns the PSC may have as regards the Icahn Group's acquisition of the power to exercise substantial influence over Potomac Edison.[34]

In fact, Potomac Edison focused on Paragraph 1(a)(ii) when it filed the Icahn Agreement, asserting categorically that "[t]he Agreement expressly prohibits the Icahn Group or the Icahn Designees from exercising substantial influence or control over FirstEnergy or any of its subsidiaries."[35] OPC explained that this was not the case, observing that the provision contains its own rule-swallowing exception, as it *further provides* that "the good faith discharge by the Icahn Designees of their fiduciary duties solely in their role as directors of the Company . . . shall in no event be deemed to constitute the exercise of substantial influence or control over the Company or any of its subsidiaries."[36] In other words, as OPC explained, Paragraph 1(a)(ii)'s alleged prohibition on exercising "substantial influence" accomplishes nothing other than requiring the Icahn Directors to abide by fiduciary obligations they were already obliged to follow as a matter of pre-existing corporate law.[37]

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[33] Icahn Agreement ¶ 1(a)(ii). OPC IB at 37-38.
[34] The only other state with a counterpart provision regulating the attempt to acquire substantial influence over a local utility is Oregon, and FirstEnergy has no utility assets there. ORS § 757.511(1). For an identification of FE's assets, *see* FirstEnergy's SEC Form 10-K dated February 16, 2022. https://www.sec.gov/ix?doc=/Archives/edgar/data/0001031296/000103129622000013/fe-20211231.htm.
[35] Icahn Agreement, Transmittal Letter at 2.
[36] OPC IB at 38 (quoting Icahn Agreement ¶ 1(a)(ii)).
[37] OPC IB at 38.

In addition to its substantive shortcomings, OPC pointed out that Paragraph 1(a)(ii)'s is enforceable only by FirstEnergy.[38] The PSC, Potomac Edison, and its ratepayers cannot do so because Paragraph 16 states that the Icahn "Agreement is solely for the benefit of the parties hereto and is not enforceable by any other persons."[39]

As further evidence of the Icahn Directors' ability to exercise substantial influence, OPC pointed to FirstEnergy's announcement in February 2022 that it had settled shareholder derivative lawsuits related to the HB6 scandal.[40] The settlement would result, *inter alia*, in six current board members not standing for re-election[41] and a potential downsizing of the Board. "FirstEnergy said it has been considering options to reduce the board's size, though it did not state a final number."[42] OPC noted that if FirstEnergy were to reduce its Board size from sixteen to ten members, the Icahn Group would enjoy two seats out of ten and need only four votes out of ten to dictate corporate action, as opposed to the other members, who would need to obtain six votes out of eight in order to oppose the Icahn Directors.[43]

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[38] OPC IB at 38.
[39] Icahn Agreement ¶ 16.
[40] OPC IB at 43-44.
[41] OPC IB at 42 n.81 (citing FirstEnergy SEC Form 8-K (Feb. 10, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001031296/3b053861-aeb0-4839-ab1c-166713217bee.pdf). The settlement was negotiated by the FirstEnergy Board of Directors' "Special Litigation Committee," a four-member group that includes Icahn-designee Jesse Lynn. OPC IB at 42 n.81 (citing FirstEnergy SEC Form 8-K (June 30, 2021), https://www.sec.gov/Archives/edgar/data/1031296/000103129621000063/fe-20210629.htm).
[42] OPC IB at 42 n.82 (citing Darren Sweeney, *FirstEnergy agrees to board refresh, review of executive team, lobbying activity, S&P Global Marketing Intelligence* (Feb. 10, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/firstenergy-agrees-to-board-refresh-review-of-executive-team-lobbying-activity-68853424).
[43] OPC IB at 42-43.

Next, OPC pointed to the power that the Icahn Directors possess as FirstEnergy board committee members.[44] Corporate boards often delegate substantial authority to subordinate committees, and that is the case with FirstEnergy. For example, Icahn Director Jesse Lynn served with three other board members on FirstEnergy's Special Litigation Committee, which "ha[d] full and binding authority to determine the Board's actions with respect to pending shareholder derivative litigation."[45] The Special Litigation Committee subsequently brokered a settlement that imposes substantial corporate governance changes at FirstEnergy which could (and ultimately did) increase the Icahn Group's voting power on the FirstEnergy board.[46]

Consistent with this evidence, OPC urged the PSC to act in accordance with its statutory responsibilities, pointing out that it "remains the last bulwark against the Icahn designees assuming the full powers the Icahn agreement gives them, including the ability

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[44] OPC IB at 44-45.

[45] OPC IB at 44 n.87 (citing *Lisa Winston Hicks and Paul Kaleta Elected to FirstEnergy Board of Directors*, FirstEnergy Corp. (June 30, 2021), https://www.firstenergycorp.com/newsroom/news_articles/lisa-winston-hicks-and-paul-kaleta-elected-to-firstenergy-board-.html).

[46] OPC IB at 45 n.88 (citing FirstEnergy SEC Form 8-K (Feb. 10, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001031296/3b053861-aeb0-4839-ab1c-166713217bee.pdf). OPC pointed out in its Reply Brief that:

> Potomac Edison has no meaningful answer to concerns about the Icahn Director's seat on the four-director "Special Litigation Committee" and the Director's ability in that role to increase the Icahn Directors' control and influence over FirstEnergy and Potomac Edison. The company simply observes that this assignment may come to end. Perhaps. But before that happens, the Board committee may well have triggered the process to review and potentially reconstitute the senior executive management of FirstEnergy and, as a consequence thereof, the membership of the Potomac Edison Board of Directors. It is irrelevant that it may eventually end. The Icahn Directors have "acquire[d] *the power* to exercise … substantial influence [over Potomac Edison] and . . . [it is immaterial] whether [they] actually will invoke that power."

OPC Reply Brief at 19-20 (quoting Order No. 82719 at 23).

to exercise substantial influence over Potomac Edison and all FirstEnergy's utilities."[47] OPC requested the issuance of a PSC order directing "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."[48]

E. Filings by other parties

While not specifically addressing the Icahn Agreement, all of the parties to the proceeding—other than Potomac Edison—urged that the PSC broaden the investigation. Montgomery County asked that the PSC "keep this matter open to consider ongoing developments[.]"[49] Interstate Gas Supply urged the PSC continue the investigation and broaden it to include FirstEnergy.[50] SUN likewise urged that the investigation be continued and broadened.[51]

F. The PSC's initial ruling on the Icahn Agreement (Order No. 90615)

The PSC found that the Icahn Agreement "does not permit the Icahn Group the level of substantial influence over Potomac Edison contemplated by PUA 6-105."[52] Without citation to any authority, the PSC described the purpose of PUA § 6-105 as "safeguard[ing] utilities from financially risky outside influences," rather than addressing what it deemed "an internal matter within FirstEnergy."[53] According to the PSC, the

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[47] OPC IB at 5.
[48] *Id.* at 54 (italics omitted).
[49] Dkt. No. 39, Montgomery County, Maryland's Comments at 4 (Feb. 18, 2022).
[50] Dkt. No. 40, Comments of Interstate Gas Supply, Inc. d/b/a/ IGS Energy and Vistra Corp. at 1 (Feb. 18, 2022).
[51] Dkt. No. 41, Next Step Recommendations of Solar United Neighbors of Maryland (Feb. 18, 2022).
[52] Order No. 90615 ¶ 60.
[53] Order No. 90615 ¶ 54.

selection of board members is "a personnel decision" about which the PSC "does not involve itself," as it is "not clear that the PSC has the authority to do so even if it desired."[54] Of course, OPC was not asking the PSC to select the board members; OPC was asking the PSC to find that affording the Icahn Group the authority to add its selected designees to the board gave the Icahn Group and the designees the ability to exercise substantial influence.

The PSC rejected OPC's contention that the PSC had previously concluded 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.[55] The PSC also noted that it acted to address substantial influence concerns by implementing a set of "ring-fencing" measures that had already been imposed "when FirstEnergy acquired Potomac Edison."[56] The PSC saw no reason to believe that those measures were "insufficient to protect Potomac Edison from any financial harm that the Nomination Agreement may or may not cause."[57] And it repeated the concern that

[54] Order No. 90615 ¶ 54.
[55] Order No. 82719 at 31. The case involved the proposed purchase by an affiliate of Electricité de France International, SA ("EDF") of a 49.99 percent ownership share in the Constellation Energy Nuclear Group ("CENG"), the subsidiary that holds the nuclear assets of Constellation Energy Group ("CEG"). The PSC there conducted a separate phase of the proceeding to determine whether the acquisition would result in EDF acquiring "substantial influence" over the policies and actions of CEG's then wholly-owned subsidiary, Baltimore Gas & Electric Company ("BGE"). The PSC concluded in Order No. 82719 that the acquisition did require approval under PUA § 6-105.
[56] Order No. 90615 ¶ 62.
[57] Order No. 90615 ¶ 62.

requiring PSC approval to designate two members of the FirstEnergy board "would involve a level of micro-management that the PSC declines to impose."[58]

G. OPC request for rehearing

OPC asked the PSC to reconsider Order No. 90615, arguing that the PSC's ruling concerning the Icahn Agreement ignored extensive evidence showing that the Icahn Directors have the ability to exercise substantial influence, and in fact have already done so.[59] OPC argued that the PSC's efforts to limit the reach of PUA § 6-105 "to safeguard[ing] utilities from financially risky practices" is contrary to the expansive language of the statute.[60]

In addition, OPC pointed out that giving the Icahn Agreement a pass on the statutory requirements could not be reconciled with the PSC's contrary ruling in Case No. 9173, in which the PSC found that EDF had the ability to exercise substantial influence over BGE by means of EDF's obtaining a seat on the board of directors of BGE's parent holding company, Constellation. The PSC found that EDF's seat on the Constellation board enabled EDF to influence and potentially adversely impact Constellation's allocation of capital to BGE.[61]

H. The PSC's ruling on rehearing (Order No. 90681)

The PSC issued an order denying rehearing.[62] The PSC reiterated that it "does not

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[58] Order No. 90615 ¶ 62. Order No. 90615 ¶ 62.
[59] Dkt. No. 55, Office of People's Counsel's Motion for Rehearing of Commission Order No. 90615 at 26-27 (June 5, 2023).
[60] OPC Motion for Rehearing at 27.
[61] Order No. 82719 at 31.
[62] Order No. 90681.

involve itself in personnel decisions by either Potomac Edison or its parent company"[63] and asserted that it has "imposed strict ring-fencing and has relied upon these ring-fencing measures to approve every case it has heard pursuant to PUA §6-105, including FirstEnergy's acquisition of the right to exercise substantial influence over Potomac Edison."[64]

This petition for judicial review followed.

STANDARD OF REVIEW

Final orders from the PSC are "prima facie correct" and should be affirmed by the court unless there is a clear showing that the order is "arbitrary and capricious," or "affected by other error of law."[65] A decision from an agency is arbitrary and capricious when "the agency exercised its discretion unreasonably or without a rational basis."[66] Though the arbitrary and capricious standard is deferential to the PSC, the deference owed to the PSC is not without limit.[67] Agency action is arbitrary and capricious where an agency "fail[s] to meaningfully consider all the relevant factors" of an issue.[68] An agency action is also arbitrary and capricious "if it is irrationally inconsistent with previous agency decisions,"[69] or departs from its prior decisions without providing an

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[63] Order No. 90681 ¶ 5.
[64] Order No. 90681.
[65] Md. Code Ann., Pub. Util. § 3-203(4)-(5).
[66] *Md. Dep't of the Env't. v. Cnty. Comm'rs. Of Carrol Cnty.*, 465 Md. 169, 202 (2019) (citation omitted) (internal quotation omitted).
[67] *Md. Office of People's Counsel v Md. Pub. Serv. Comm'n*, 465 Md. 169, 202 (2018).
[68] *Baltimore Police Dept. v. Open Justice Baltimore*, No. 20 slip op. at 3 (Md. Aug. 31, 2023). *Accord Motor Vehicles Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).
[69] *Harvey v. Marshall*, 389 Md. 243, 303, 884 A.2d 1171 (2005).

adequate explanation for its change in position.[70]

As compared to an agency's factual findings or discretionary decisions, an agency's legal conclusions are "accord[ed] . . . less deference."[71] "[I]n construing a law that the agency has been charged to administer, the reviewing court is to give careful consideration to the agency's interpretation."[72] Nevertheless, in cases "where an administrative . . . agency draws impermissible or unreasonable inferences and conclusions . . . or where an administrative agency's decision is based on an error of law, [the Court affords] the agency's decision no deference."[73] "[A] court will not uphold an agency action that is based on an erroneous legal conclusion."[74]

ARGUMENT

I. The PSC erred in finding that the Icahn Group and Icahn Directors have not obtained the ability to exercise substantial influence over Potomac Edison.

PUA § 6-105(e)(1) is expansive, as it prohibits without PSC approval any person affiliated with a Maryland regulated electric company from "acquir[ing], directly or indirectly, the power to exercise any substantial influence over the policies and actions of [said utility]." The Icahn Group unquestionably became affiliated with Potomac Edison when it acquired some 19 million shares of First Energy stock. And the PSC correctly concluded that whether this stock acquisition and the execution of the Icahn Agreement

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[70] *Frederick Classical Charter Sch. v. Frederick Cnty. Bd. of Educ.*, 454 Md. 330, 407 (2017). *Accord FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).
[71] *Md. Small MS4 Coalition v. Md. Dep't of the Env't*, 479 Md. 1, 30 (2022) (*Maryland Small)* (citing *Md. Dep't of the Env't v. Anacostia Riverkeeper*, 447 Md. 88, 122 (2016)).
[72] *Maryland Small,* 479 Md. at 30.
[73] *Lewis v. Dep't of Natural Res.*, 377 Md. 382, 435 (2003), *superseded by statute on other grounds as stated in Becker v. Anne Arundel County*, 174 Md. App. 114 (2007) (citations omitted).
[74] *Maryland Small*, 479 Md. at 30.

"are considered one act or a common purpose" is "irrelevant" to deciding if the Icahn Group acquired substantial influence by means of "its ability to appoint two members to FirstEnergy's Board of Directors."[75] As explained above, OPC made a compelling showing, consistent with both the evidence and prior PSC rulings, that pursuant to the Icahn Agreement and the Icahn Group's attendant right to name two directors to the FirstEnergy board, the Icahn Group acquired the ability to exercise substantial influence over Potomac Edison.[76]

The PSC responded by side-stepping OPC's (uncontroverted) evidence,[77] concluding that the Icahn Agreement is an "internal," "personnel decision," and outside of the purpose of PUA § 6-105, which it said is "to safeguard utilities from financially risky outside influences."[78] The PSC reaffirmed these findings in denying reconsideration,[79] explaining that "the Commission does not involve itself in personnel decisions by either Potomac Edison or its parent company."[80] The PSC's determination ignores record evidence, represents an unexplained departure from PSC precedent, and cannot be reconciled with the broad protective purpose of the statute.

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[75] Order No. 90615 ¶ 54.
[76] In this brief we refer to the Icahn Group as having acquired the ability to exercise substantial influence, which it is exercising through the designation of its directors to the FirstEnergy board and with those directors having unique governance authorities.
[77] OPC attached to its Initial Brief an appendix (497 pages in length) that includes the Icahn Agreement, Potomac Edison responses to data requests, and sundry publicly available materials. Potomac Edison did not dispute OPC's recitation of FirstEnergy's rights under the Icahn Agreement or the rights that the Icahn directors would possess pursuant to the Icahn Agreement and as FirstEnergy board members.
[78] Order No. 90615 ¶ 54.
[79] Order No. 90681 ¶ 6.
[80] Order No. 90681 ¶ 5.

A. The PSC's failure to address the factors relevant to PUA § 6-105 was arbitrary and capricious.

The statutory inquiry is straightforward. Pursuant to PUA § 6-105(e)(1), the PSC must determine whether an affiliate of a utility—here an investor in FirstEnergy holding hundreds of millions of in stock—"acquir[ed] directly or indirectly, the power to exercise any substantial influence" over Potomac Edison. As a determiner before a noun, the word "any" is used to express "of whatever kind."[81] The plain language of PUA § 6-105(e)(1) reaches and protects ratepayers against a utility affiliate's unauthorized exercise of any type of substantial influence.[82] To like effect, "'the statute does not define the Commission's authority by reference to a specific form of transaction.'"[83] The PSC was required to assess the factual evidence and determine whether the Icahn Agreement would afford the Icahn Group the practical ability to exercise "any" substantial influence over Potomac Edison. It failed to do so. Having "failed to meaningfully consider all the relevant factors" to the statutory task at hand, the PSC's action must be reversed and vacated.[84]

FirstEnergy is an Ohio corporation.[85] Except as otherwise provided, under Ohio law "all of the authority of a corporation shall be exercised by or under the direction of its directors."[86] The FirstEnergy board also possesses ultimate authority over Potomac

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[81] Merriam Webster Dictionary (online), https://www.merriam-webster.com/dictionary/any.
[82] There are only two statutory exceptions to the substantial influence inquiry both limited to an electric and gas utility (such as BGE) and thus irrelevant here. PUA §§ 6-105 (e)(2)(i) & (ii).
[83] Order No. 82719 at 14 (quoting Order No. 82407 at 5-6).
[84] *Baltimore Police Dept. v. Open Justice Baltimore*, No. 20 slip op. at 3.
[85] *Re FirstEnergy Corporation*, Case No. 9233, Order No. 83788 at 4 (2011).
[86] Ohio Rev. Code § 1701.59(A). Ohio law accords with basic corporate law elsewhere. See Del. Code Ann. tit. 8, § 131(a); Jill Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 Wash. U. L. Rev. 915, 942 (2022).

Edison because Potomac Edison is FirstEnergy's wholly-owned subsidiary.[87] As such, OPC explained that the two Icahn Group-designated directors "enjoy substantial influence over Potomac Edison . . . by means of their presence on the FirstEnergy Board and sundry Board committees, their access to corporate information, and their attendant ability to influence other Board members and argue for and against various corporate policies and objectives."[88] The Icahn Directors "will have access to private information about FirstEnergy's plans and the opportunity to weigh in on those plans before they are implemented."[89] It was undisputed that as a result of the Icahn Agreement, "the Icahn Directors share in the fundamental governance power of the corporation, and will have the ability to vote on every major decision that comes before the Board, including matters directly material to Potomac Edison, such as capital expenditures; indeed, their votes may be outcome determinative."[90]

As explained before the PSC and reiterated above, the Icahn Directors possess unique corporate governance rights. Pursuant to Paragraph 1.a(xi) of the Icahn Agreement, FirstEnergy cannot form an executive committee without including an Icahn Director. The provision further provides the Icahn Directors with rights to participate in key activities and decisions that are not held by any other FirstEnergy director:

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[87] Order No. 90615 ¶ 4 ("FirstEnergy is the parent owner of The Potomac Edison Company."). *See, also*, Virginia Harper Ho, *Team Production & the Multinational Enterprise*, 38 Seattle U. L. Rev. 499, 507 (2015) ("[T]he existence of a corporate board at multiple tiers of the organization does not diminish the role of corporate boards at the headquarters or ultimate parent level in shaping strategy and decisionmaking, nor does it ignore the importance of hierarchical control.").
[88] OPC IB at 46.
[89] OPC Reply Brief at 19.
[90] OPC Reply Brief at 18.

> [A]ny Board consideration of appointment and employment of named executive officers, mergers and acquisitions of material assets, or dispositions of material assets, or similar business transactions, such voting thereto shall take place only at the full Board level or in Board committees of which one of the Icahn Designees is a member[].

In fact, OPC demonstrated the Icahn Directors both possess substantial influence rights and have exercised them over FirstEnergy. OPC explained that one of the Icahn Directors served with three other board members on the Special Litigation Committee which "ha[d] full and binding authority to determine the Board's actions with respect to pending shareholder derivative litigation."[91] At the time of OPC's Initial Brief was submitted to the PSC, the Special Litigation Committee had entered into a settlement that proposed substantial corporate governance changes at FirstEnergy including the reduction of the size of the FirstEnergy board. That settlement has since been implemented and the FirstEnergy board has been substantially reduced in number, thereby increasing the voting power of the Icahn Directors.[92]

OPC also demonstrated the special influence that the Icahn Directors would possess as the representative of investment group holding (at the time) an estimated "$791 million ownership interest in FirstEnergy."[93] And this was not just any large shareholder. "Icahn and the Icahn Group [had] a reputation as one of the foremost

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[91] OPC IB at 44.
[92] Order of Final Settlement Approval, *Employees Retirement System of the City of St. Louis and Electrical Workers Pension Fund, Local 102, IBEW v. Jones*, Case No. 2:20-cv-04813-ALM-KAJ (S.D. Ohio Aug. 23, 2023).
[93] OPC IB at 45.

institutional investors in the United States," were viewed as highly activist investors, and controlled an investment enterprise with "some $28 billion in assets."[94]

The PSC's action ignores the uncontroverted record evidence that, as a result of the Icahn Agreement, the Icahn Group now possesses the ability to exercise substantial influence over FirstEnergy by means of its board seats and related, unique rights, and in doing so necessarily possesses the ability to exercise substantial influence over Potomac Edison. The PSC's failure to address OPC's evidentiary showing concerning the core issue of statutory inquiry renders its action arbitrary and capricious.[95]

B. The PSC's determination that the Icahn Group has not obtained substantial influence over Potomac Edison is an unexplained and impermissible departure from PSC precedent.

The PSC's consideration of the "substantial influence" issue below did not occur in a vacuum. As explained above, the PSC previously addressed "substantial influence" in the context of board membership in Case No. 9173. Case No. 9173 involved the proposed purchase by EDF of a 49.99 percent ownership share in Constellation CENG, the subsidiary that would hold the nuclear assets of Constellation.[96] The PSC conducted a separate evidentiary phase of those proceedings focused on determining whether the acquisition would result in EDF acquiring substantial influence over the policies and actions of Constellation's wholly-owned (and PSC-regulated) subsidiary, BGE.

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[94] OPC IB at 45-46.
[95] *Baltimore Police Dept. v. Open Justice Baltimore*, No. 20 slip op. at 3; *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).
[96] Order No. 82719.

In the order conditionally approving the transaction, the PSC found that EDF would possess the requisite influence in two separate ways. First, the PSC found that "EDF's veto power over decisions by CENG to authorize dividends to [Constellation] alone qualifies as the power to exercise substantial influence."[97] EDF's practical ability to control a vital stream of revenues enabled it to exercise substantial influence over Constellation and thus, the ability to influence its decisions concerning BGE. Nevertheless, "EDF's post-closing influence over [Constellation] and BGE [did] not end with its ability to block dividends from [the new joint venture] to [Constellation]."[98]

The PSC went on to address separately the issue of substantial influence arising from investor EDF's rights to nominate a single director to Constellation's board of directors. The PSC 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.[99]

Following an extensively-litigated proceeding, which (unlike the proceedings below) included pre-filed testimony and several days of hearings, the PSC found that investor EDF's board member could influence the parent holding company's decisions, and gain access to, and thereby "weigh in on" internal corporate plans:[100]

> [Constellation CEO] Shattuck admitted that "EDF [will] have the means to influence [the parent company] . . . by the expression of the views of their one director." Similarly,

[97] Order No. 82719 at 24.
[98] Order No. 82719 at 31.
[99] Order No. 82719.
[100] Order No. 82719.

> [EDF Vice President] Morris described the EDF director as having "the opportunity to express an opinion and argue a position, to put arguments on the table and advocate things." EDF will have access to private information about [corporate] plans and the opportunity to weigh in on those plans before they are implemented.

Indeed, EDF witness Morris candidly acknowledged that EDF understood its board seat would "enable[] [EDF] to have oversight of [its] investment."[101] The PSC noted that in addition to his ordinary board rights, the EDF director might "serve on or even lead influential committees."[102]

Consistent with these findings, the PSC detailed how EDF's board seat at the holding company level would provide it with substantial influence. "[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 BGE, 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]."[103]

In this case, OPC explained to the PSC that "[t]he 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."[104] As with the description of the rights afforded the Icahn Group and its FirstEnergy board-designees, OPC's assertion with respect to capital allocation by FirstEnergy among its various utility company

[101] Order No. 82719 at 31 n.112.
[102] Order No. 82719 at 24.
[103] Order No. 82719 at 34.
[104] OPC IB at 33.

subidiaries was not challenged. Nonetheless, the PSC rejected the contention that the ruling in *EDF* mandated a similar outcome here.[105]

While the PSC may change its policies, it must "display [an] awareness that it *is* changing position" and may not "depart from a prior policy *sub silentio*."[106] It must show that its prior policies "are being deliberately changed, not casually ignored."[107] Without acknowledging that it is doing so, the PSC's Orders depart from PSC precedent in finding that the Icahn Group's board of director rights do not provide it and its directors the ability to exercise substantial influence over Potomac Edison.

The PSC acknowledged its decision in *EDF* but failed to distinguish that proceeding from this one. The PSC noted that "the influence that EDF could potentially exert on BGE went far beyond that one issue [of EDF's right to appoint a seat on the board of directors]."[108] This is a distinction without a difference, based on the express language of the *EDF* decision. That EDF had other means of exercising substantial influence over BGE does not detract from the PSC's finding in *EDF* that the power to exercise substantial influence inheres in the investor's right to membership on the holding company's board of directors—separate and apart from all other considerations.

The PSC's initial Order No. 90615, which its order on rehearing declined to reverse, also finds that PUA § 6-105 is not applicable here because the Icahn Agreement, "unlike [the transaction agreement at issue in *EDF*] involves what can essentially be

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[105] Order No. 90615, ¶¶ 54, 60-63; Order No. 90681 ¶ 5.
[106] *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).
[107] *Frederick Classical Charter Sch.v. Frederick Cnty. Bd. of Educ.*, 454 Md. 330, 407 (2017).
[108] Order No. 90615 ¶ 62.

described as a personnel decision."[109] The PSC similarly described the Icahn Group's right to name board members as an "internal matter within FirstEnergy"[110] and expressed concern that a substantial influence finding would "involve a level of micro-management that the PSC declines to impose."[111]

The PSC nowhere provides a basis for this purported distinction between the two cases, and there is none. Both the instant case and *EDF* involved the right of an investor to nominate a member of the board of directors of a PSC-regulated utility. In neither case was the PSC asked to select a board member or to otherwise pass on the suitability of an individual candidate. The pertinent inquiry for PUA § 6-105 purposes is not whether an investor's right to nominate a director to the parent holding company's board of directors is a "personnel matter." Rather, the issue is whether the nomination right affords the investor the power to exercise substantial influence over a subsidiary utility. Here, as in *EDF*, an investor has obtained the contractual right to nominate board member(s). Those nominees can influence the board, advocate for corporate policies, gain access to internal information, seek to lobby for or against corporate plans before they are implemented, and vote on matters essential to the corporation and its subsidiary utility. Order No. 90615, as upheld by Order No. 90681, fails to explain why comparable board rights result in opposite outcomes.

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[109] Order No. 90615 54.
[110] Order No. 90615.
[111] Order No. 90615 ¶ 62.

Agency actions are arbitrary and capricious when they are "irrationally inconsistent with previous agency decisions"[112] and "similarly situated individuals are treated differently without a rational basis for such a determination."[113] Order No. 90615's contention, affirmed in Order No. 90681, that the appointment of the Icahn Directors, unlike the appointment of the EDF director, concerns "a personnel decision," cannot be credited. It is nothing more than unfounded say so. In "gloss[ing] over" a departure from precedent, the Orders "'cross the line from the tolerably terse to intolerably mute.'" [114]

Caselaw elsewhere further demonstrates that the PSC's dismissive treatment of the Icahn Group's board member rights is unreasoned. In *Evergy Kansas*, the Federal Energy Regulatory Commission (FERC) explained that an investor's ability to name its own director to the board of directors afforded the investor active control over the corporation, finding that:

> Board membership confers rights, privileges, and access to non-public information, including information on commercial strategy and operations. Where an investor's own officer or director, or other appointee accountable to the investor, is appointed to the board of a public utility or holding company that owns public utilities, the investor itself will have those rights, privileges, and access, and *thus the authority to influence significant decisions involving the public utility* or public utility holding company.[115]

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[112] *Harvey v. Marshall*, 389 Md. 243, 303, 884 A.2d 1171 (2005).
[113] *Harvey v. Marshall*, 389 Md. at 303-304.
[114] *Montgomery County v. Anastasi*, 77 Md. App. 126, 137, 549 A.2d 573 (Md. Ct. Spec. App. 1988) (quoting *Local 32, Am. Fed'n of Gov't Emp. v. FLRA.*, 774 F.2d 498, 502 (D.C. Cir. 1985)).
[115] *Evergy Kansas Central, Inc.* 181 FERC ¶ 61,044, PP 44, 45 (2022) (emphasis added).

FERC's *Evergy Kansas* decision focuses on the same corporate governance considerations as *EDF* and comes to the same conclusion: an investor's right to nominate a director to the board of a utility holding company affords the investor substantial influence over the utility. The PSC here addresses none of the concerns about authority and influence attendant to Board membership raised in *EDF* and *Evergy Kansas*.

Scholarship in this area is to like effect. In the last decade or so, there has been a major expansion in the use of investor-corporate agreements—commonly referred to as shareholder agreements—in large publicly traded corporations.[116] Because these shareholder agreements are negotiated instruments, they vary in their terms. Nevertheless, as is the case with the Icahn Agreement, they often entitle a large investor to one or more seats on the corporate board of directors.[117] In doing so they "operate as [corporate] governance devices."[118] This affords the investor unique corporate governance rights—different from other shareholders—because "[t]he board of directors . . . has primary authority to operate the corporation."[119]

EDF stands for the reasoned—if not self-evident—proposition that an investor can gain substantial influence over a Maryland utility by means of obtaining a seat on the board of the utility's holding company and thereby influence and control the corporation's policies, objectives, and conduct, including with respect to a subsidiary

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[116] *See* Fisch, *supra*. *See also* Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 Yale L.J. 1124, 1128 (2021).
[117] "Statutory corporate law confers authority over corporate affairs on the board of directors and justifies that authority through the board's election by shareholders." However, "[s]hareholders, if they so desire, can bargain directly over directorships by contract." Rauterberg at 1128.
[118] Fisch at 931.
[119] Fisch at 942.

utility. OPC has shown that the Icahn Agreement affords the Icahn Group and the Icahn Directors like ability to exercise substantial influence over FirstEnergy, and thus Potomac Edison. The PSC dismisses these considerations with respect to the Icahn Group's board rights as matters "the Commission does not involve itself in." This unreasoned departure from precedent cannot properly be sustained.

II. The PSC errs in finding that the current ring-fencing measures adequately protect customers from the Icahn Group's board rights.

Relying upon a 1988 PSC order that predates the passage of PUA § 6-105, the PSC objects to reviewing Icahn's board rights as an improper intrusion into FirstEnergy's (or Potomac Edison's) "business judgment."[120] That determination cannot be reconciled with the statute. The General Assembly enacted PUA § 6-105 in 2006, and in doing so "introduced to the Public Utility Companies Article the concept of 'any substantial influence.'"[121] The legislature charged the PSC with enforcing[122]

> the policy of the State to regulate acquisitions by persons that are not engaged in the public utility business in the State 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 in order to prevent unnecessary and unwarranted harm to the customers of the public service company.

OPC has made an unrebutted showing that investor Icahn has acquired substantial influence over Potomac Edison by means of the Icahn Agreement and the Icahn Group's

[120] Order No. 90615 at 21 n.82 (quoting *Re Sapphire Communications of Maryland, Inc.*, 79 Md. P.S.C. 353, Order No. 68243 (Oct. 27, 1988)).
[121] Order No. 82719 at 15-16.
[122] PUA § 6-105 (b)(2).

attendant rights to FirstEnergy board seats. Far from intruding in matters beyond its purview, the PSC is tasked with ensuring that the Icahn Group's acquisition of substantial influence is "consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers."[123] The PSC is not being asked to name its favored designee to the FirstEnergy Board, but rather to ensure the necessary safeguards are imposed to protect ratepayer interests.[124]

To that end, the PSC is required to assess 12 separate statutory factors, including "whether it is necessary to revise the Commission's ring fencing and code of conduct regulations in light of the acquisition."[125] The PSC improperly prejudges this issue and concludes that the ring-fencing measures imposed by the PSC in 2011 when FirstEnergy acquired Potomac Edison are adequate "to protect Potomac Edison from any financial harm that the Nomination [Icahn] Agreement may . . . cause."[126] There is no record evidence to support this determination.[127] FirstEnergy and the Icahn Group did not participate in the proceeding in this case, only Potomac Edison; the PSC obtained no testimony or evidence from FirstEnergy or the Icahn Group concerning the Icahn

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[123] PUA § 6-105(g)(3)(i).
[124] Pursuant to PUA § 6-105 (g)(3)(ii) the Commission possesses conditioning authority.
[125] PUA § 6-105 (g)(2)(xi).
[126] Order No. 90615 at 21 (referring to *Re FirstEnergy Corporation*, Case No. 9233, Order No. 83788 (2011)).
[127] The PSC's Orders do not address the provision of the Icahn Agreement prohibiting the Icahn Directors from exercising substantial influence over FirstEnergy. Icahn Agreement ¶ 1(a)(ii). Because an agency's orders cannot be affirmed for reasons not stated by the agency, this provision is irrelevant for purposes of judicial review. *United Steelworkers of Am. AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679, 472 A.2d 62, 69 (1984). In any event, the proviso affords ratepayers no meaningful protection from the Icahn Directors' exercise of substantial influence because it is only enforceable by FirstEnergy or the Icahn Group and is not a meaningful standard as written. If anything, and as noted earlier, the provision is effectively an admission that the Icahn Group has gained the power to exercise substantial influence but seeks to avoid PUA § 6-105 through an unenforceable promise not to use it.

Directors and their conduct as board members; and the PSC has gained no insight into what matters have come before the FirstEnergy board and the Icahn Directors concerning Potomac Edison, such as FirstEnergy's internal strategic plans concerning the utility.

In any event, relying on ring-fencing provisions implemented in 2011 seems cold comfort given developments concerning FirstEnergy since then. For example, following the HB6 scandals, FirstEnergy entered into a Deferred Prosecution Agreement with the Department of Justice that commits FirstEnergy to numerous undertakings to protect ratepayers against a repetition of such malfeasance. Several of these compliance measures involve the FirstEnergy board or board committees.[128] Because the 2011 ring-fencing conditions do not provide the PSC an express right to access the books and records of either FirstEnergy or FirstEnergy Service Company as they relate to Potomac Edison, the PSC has only a limited understanding of what FirstEnergy has done in this regard, or whether the Icahn Directors have proposed that FirstEnergy take additional or different measures to ensure corporate integrity going forward. These regulatory matters are plainly matters central to protecting Potomac Edison's ratepayers, they reflect core purposes of PUA § 6-105, and the PSC has the power to modify the FirstEnergy ring-

[128] The Deferred Prosecution Agreement (at 7) requires, among other things, that: FirstEnergy establish an Executive Director role for the Board which supports enhanced controls and procedures; FirstEnergy hire a new Chief Ethics Officer who reports directly to the Audit Committee; FirstEnergy create a Compliance Oversight subcommittee of the Audit Committee; and FirstEnergy review and revise its political activity and lobbying consulting policies.

fencing provisions to ensure adequate access to information relevant to Potomac Edison.[129]

In addition, much has changed for the Icahn Group since it acquired its substantial interest in FirstEnergy and entered into the Icahn Agreement. On March 19, 2021, the day after the Icahn Directors were nominated to the FirstEnergy board, the price of Icahn Enterprises LP common stock was $58.79 per share.[130] As of October 16, 2023, the share price of that same stock had collapsed to $17.72 per share. This precipitous decline was apparently triggered by a Hindenburg Research report on Icahn Enterprises published on May 2, 2023.[131] That report alleges, *inter alia*, that "Icahn has been using money taken in from new investors to pay out dividends to old investors. Such ponzi-like economic structures are sustainable only to the extent that new money is willing to risk being the last one 'holding the bag.'"[132] The U.S. Attorney's office for the Southern District of New York commenced an investigation into Icahn Enterprises the day following the

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[129] The PSC conditioned its approval of AltaGas's acquisition of Washington Gas upon a 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." *In the Matter of the Merger of AltaGas Ltd. And WGL Holdings, Inc.*, Case No. 9449, Order No. 88631, App. A., A-10 – A-11 (Apr. 4, 2018) (Commitment 19).

[130] *See* the interactive graph of NASDAQ data for the 5 year share prices for Icahn Enterprises LP common stock available at https://www.google.com/finance/quote/IEP:NASDAQ?sa=X&ved=2ahUKEwjM3uOtjfuBAxVxFFkFHVtPAg8Q3ecFegQIHxAX.

[131] Hindenburg Research, *Icahn Enterprises: The Corporate Raider Throwing Stones From His Own Glass House* (May 2, 2023), https://hindenburgresearch.com/icahn/.

[132] Hindenburg Research, *Icahn Enterprises: The Corporate Raider Throwing Stones From His Own Glass House* (May 2, 2023), https://hindenburgresearch.com/icahn/.

Hindenburg Research report.[133] Given these developments, the participation by Icahn Group-designated directors on the FirstEnergy Board is surely a matter of concern to the PSC, Potomac Edison, and its customers.

CONCLUSION

For the reasons stated herein, the Court should vacate the PSC's findings concerning the Icahn Agreement and remand the matter to the PSC for further proceedings consistent with the requirements of PUA § 6-105.

DAVID S. LAPP
PEOPLE'S COUNSEL

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juliana.bell2@maryland.gov

October 23, 2023

[133] FirstEnergy SEC Form 10-Q at 31 (May 9, 2023), https://www.ielp.com/static-files/a533bd48-4afd-476b-ab0c-173cb0566ed4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of October, 2023, the foregoing Memorandum of the Maryland Office of People's Counsel was either hand-delivered, or mailed first class, postage prepaid, and emailed to all parties listed below:

Joseph M. English,
Assistant General Counsel
Maryland Public Service Commission
6 St. Paul St., 16th Floor
Baltimore, Maryland 21202
E-mail: joseph.english@maryland.gov

Joseph J. Curran III, Esquire
Venable LLP
750 East Pratt Street
Suite 900
Baltimore, Md. 21202
E-mail: jcurran@Venable.com

Susan R. Shipper, Esquire
Venable LLP
750 East Pratt Street
Suite 900
Baltimore, Md. 21202
E-mail: srschipper@Venable.com

Juliana Bell

APPENDIX TO MEMORANDUM OF PETITIONER MARYLAND OFFICE OF PEOPLE'S COUNSEL

of all available regulatory and subsequent court appeals processes, and (ii) March 1, 2022, (x) required the termination of one or more Icahn Designees (or any Replacement Designee) as a director of the Company, (y) denied or declined to grant any required approvals or clearances necessary to permit the Icahn Designees (or any Replacement Designee) to remain a director of the Company in accordance this Agreement or (z) included an Unacceptable Condition (as defined below) to any such approval or clearance. "**Unacceptable Condition**" means any condition, term, commitment, sanction, undertaking, concession or requirement, including a divestiture, rate credit, rate change, operational investment, financial payment, governance requirement, subsidiary board of director change, audit, independent monitor, dividend restriction or limitation, or any ringfencing or financial protection condition, which, individually or in the aggregate, in the opinion of the Company or the Icahn Group, in each case acting reasonably and in good faith, would cause an effect that is more than de minimis on the Company, any of its subsidiaries or affiliates, or any member of the Icahn Group. In the event that any Regulatory Authority shall require the termination of one or more Icahn Designees (or any Replacement Designee) as a director of the Company, (x) each of the Company and the Icahn Group shall cooperate pursuant to Section 1(a)(vi) below to obtain all necessary Regulatory Approvals to permit such Icahn Designee(s) to promptly rejoin the Board and (y) in the interim, the Company shall appoint to the Board, in replacement of each such Icahn Designee, an independent director who is not affiliated with the Icahn Group and who is reasonably acceptable to both the Icahn Group and the Company, and who shall resign from the Board promptly upon such time, if any, that such Icahn Designee is permitted to rejoin the Board.

(v) Unless a Regulatory Denial shall have occurred, the Company shall use reasonable best efforts to cause the election of each of the Icahn Designees at the 2021 Annual Meeting (including by (x) recommending that the Company's shareholders vote in favor of the election of each of the Icahn Designees, (y) including each of the Icahn Designees in the Company's proxy statement and proxy card for the 2021 Annual Meeting, and (z) otherwise supporting each of the Icahn Designees for election in a manner no less rigorous and favorable than the manner in which the Company supports its other nominees in the aggregate). The Icahn Group agrees not to conduct a proxy contest or engage in any solicitation of proxies, regarding any matter, including the election of directors, with respect to the 2021 Annual Meeting.

(vi) That, until March 1, 2022, the Company and the Icahn Group will each use all reasonable efforts (including the exhaustion of all available appeals processes) to (x) obtain all approvals and clearances of the Regulatory Authorities necessary to permit the Icahn Designees (and any Replacement Designees) to remain a director of the Company (or to rejoin the Board, as applicable), to vote at meetings of the Board or any Board Committee and to take the other actions contemplated by this Agreement and the Confidentiality Agreement on terms which are acceptable to each of the Company and the Icahn Group (the "**Regulatory Approvals**"), and (y) oppose all actions of the Regulatory Authorities which constitute or could reasonably be expected to give rise to a Regulatory Denial or an Unacceptable Condition, and the Company and the

Section 305 of the Federal Power Act and is not inconsistent with the requirements of Section 8 of the Clayton Act (collectively clauses (A) through (D), the "**Director Criteria**"); provided that (i) no new Director Criteria will be adopted that would have prevented the Icahn Designees from becoming directors had such criteria been in effect as of the date of this Agreement, and (ii) based upon the information which the Icahn Group and the Icahn Designees have provided, the Company acknowledges that Andrew Teno and Jesse Lynn each satisfy the requirements of Section 1(a)(viii)(B).

(ix) That (1) for any annual meeting of shareholders subsequent to the 2021 Annual Meeting, the Company shall notify the Icahn Group in writing no less than thirty-five (35) calendar days before the advance notice deadline set forth in the Company's Code of Regulations whether the Icahn Designees will be nominated by the Company for election as directors at such annual meeting and (2) if the Icahn Designees are to be so nominated, shall use reasonable best efforts to cause the election of the Icahn Designees so nominated by the Company (including by (x) recommending that the Company's shareholders vote in favor of the election of the Icahn Designees, (y) including the Icahn Designees in the Company's proxy statement and proxy card for such annual meeting and (z) otherwise supporting the Icahn Designees for election in a manner no less rigorous and favorable than the manner in which the Company supports its other nominees in the aggregate), and the Icahn Group agrees not to conduct a proxy contest or engage in any solicitation of proxies, regarding any matter, including the election of directors, with respect to any such annual meeting at which the Company has nominated Icahn Designees and such Icahn Designees have consented to being named, and are named, in the proxy statement relating to such annual meeting.

(x) That as of the date of this Agreement, the Company represents and warrants that, (y) prior to the Board appointing the Icahn Designees as directors, the Board is composed of 12 directors and that there are no vacancies on the Board, and (z) immediately after the Board appoints the Icahn Designees as directors, the Board will be composed of 14 directors and that there will be no vacancies on the Board.

(xi) That from and after the date of this Agreement, so long as an Icahn Designee is a member of the Board and the applicable Regulatory Approvals have been obtained, without the approval of the Icahn Designees then on the Board (such approval not to be unreasonably withheld, delayed or conditioned), (x) the Board shall not form an Executive Committee or any other committee with functions similar to those customarily granted to an Executive Committee (it being understood and agreed that if an Executive Committee is formed prior to the Regulatory Approvals having been obtained, the Icahn Designees shall receive notice of, and the right to attend, all meetings thereof in a non-voting capacity); and (y) the Board shall not form any other new committee (other than committees formed with respect to matters for which there are actual conflicts of interest between the Icahn Designees and the Company), without offering to at least one Icahn Designee the opportunity to be a member of such committee (it being understood and agreed that if any such new committee is formed prior to the Regulatory Approvals having been obtained, the Icahn Designees shall receive

(xiv) Concurrently with their appointments to the Board pursuant to Section 1(a)(i) and subject to compliance with all stock exchange rules, and the requirements of the federal securities laws, the Board will consider appropriate appointments for the Icahn Designees to applicable Board committees as they would consider such appointments for other Board candidates. Notwithstanding the foregoing, the Company acknowledges that for so long as the Icahn Designees are members of the Board (including, for the avoidance of doubt, prior to the Regulatory Approvals being obtained), the Icahn Designees shall have the same rights as any other director of the Company with respect to being permitted to attend (as an observer and without voting rights) any Board committee meeting regardless of whether such director is a member of such committee, except in cases where privileged matters will be discussed or reviewed (unless the Icahn Designees commit, in writing, on terms reasonably satisfactory to the Company, not to share information relating to such matters with the Icahn Group, including its Affiliates, Associates and representatives), where the matters under consideration involve an actual conflict of interest between the Company and the Icahn Group or its Affiliates or Associates, or where, upon advice of outside counsel to the Company, the Icahn Designees attendance would jeopardize any legal privilege.

(xv) That, to the extent applicable to all other directors, the Icahn Group will cause each Icahn Designee, as well as any Replacement Designee, within 90 days following election to the Board, to become and to remain the beneficial owner of not less than 100 Common Shares, except where such ownership would be inconsistent with or prohibited by (i) any applicable law, rule, regulation, order or decree of any governmental authority or (ii) any policy, contract, commitment or arrangement authorized by the Company.

(b) At all times from the date of this Agreement through the termination of their service as a member of the Board, each of the Icahn Designees shall comply with all written policies, procedures, processes, codes, rules, standards and guidelines applicable to all non-employee Board members and of which the Icahn Designees have been provided written copies in advance (or which have been filed with the United States Securities and Exchange Commission ("**SEC**") or posted on the Company's website), including the Company's code of business conduct, Board of Directors Code of Ethics and Business Conduct, Corporate Governance Policies, corporate policies on ethical business conduct, political contributions, lobbying and other political activities policy, conflicts of interest policy, Board confidentiality policy, insider trading policy, anti-hedging policy and governance policies (collectively, the "**Company Policies**"), and shall preserve the confidentiality of Company business and information, including discussions or matters considered in meetings of the Board or Board committees (except to the extent permitted in the Confidentiality Agreement (as defined below) to be entered into pursuant to Section 5 of this Agreement). In addition, each of the Icahn Designees is aware of and shall act in accordance with his or her fiduciary duties with respect to the Company and its shareholders. For the avoidance of doubt, the Parties agree that notwithstanding the terms of any Company Policies, in no event shall any Company Policy apply to the Icahn Group, other than the Icahn Designees in their capacity as members of the Board.

(c) Any provision in this Agreement to the contrary notwithstanding, if at any time after the date of this Agreement, the Icahn Group, together with any Icahn Affiliates (as defined

(d) So long as the Icahn Group, together with the Icahn Affiliates, beneficially owns an aggregate Net Long Position in at least one and one-half percent (1.5%) of the total outstanding Common Shares (as adjusted for any stock dividends, combinations, splits, recapitalizations or similar type events), the Company shall not adopt a Rights Plan with an "Acquiring Person" beneficial ownership threshold below 10.0% of the then-outstanding Common Shares, unless the "Acquiring Person" definition of such Rights Plan exempts the Icahn Group up to a beneficial ownership of 9.99% of the then-outstanding Common Shares. The term "**Rights Plan**" shall mean any plan or arrangement of the sort commonly referred to as a "rights plan" or "stockholder rights plan" or "shareholder rights plan" or "poison pill" that is designed to increase the cost to a potential acquirer of exceeding the applicable ownership thresholds through the issuance of new rights, common stock or preferred shares (or any other security or device that may be issued to shareholders of the Company, other than ratably to all shareholders of the Company) that carry severe redemption provisions, favorable purchase provisions or otherwise, and any related rights agreement.

(e) The Company and the Icahn Group agree to negotiate in good faith and enter into a customary form of registration rights agreement with respect to the Shares beneficially owned by the Icahn Group (the "Registration Rights Agreement") by no later than July 1, 2021, which such Registration Rights Agreement shall include the terms as set forth in **Exhibit D**.

2. Additional Agreements.

(a) Unless the Company or the Board has breached any material provision of this Agreement and failed to cure such breach within five (5) business days following the receipt of written notice from the Icahn Group specifying any such breach, solely in connection with the 2021 Annual Meeting, each member of the Icahn Group shall (1) cause, in the case of all Voting Securities (as defined below) owned of record, and (2) instruct and cause the record owner, in the case of all shares of Voting Securities beneficially owned but not owned of record, directly or indirectly, by it, or by any Icahn Affiliate, in each case as of the record date of the 2021 Annual Meeting or as to which the member of the Icahn Group otherwise has the power to vote or direct the vote, in each case that are entitled to vote at the 2021 Annual Meeting, to be present for quorum purposes and to be voted, at the 2021 Annual Meeting or at any adjournment or postponement thereof, (A) for each nominee recommended by the Board for election at the 2021 Annual Meeting, (B) against any nominees that are not nominated by the Board for election at the 2021 Annual Meeting and (C) in favor of the ratification of the Company's auditors. Except as provided in the foregoing sentence and in Section 2(b), the Icahn Group shall not be restricted from voting "For," "Against" or "Abstaining" from any other proposals at the 2021 Annual Meeting.

(b) Unless the Company or the Board has breached any material provision of this Agreement and failed to cure such breach within five (5) business days following the receipt of written notice from the Icahn Group specifying any such breach, for any annual meeting or special meeting of shareholders subsequent to the 2021 Annual Meeting, if the Board has agreed to nominate the Icahn Designees (or Replacement Designees) then serving on the Board for election at such annual meeting or special meeting and the Icahn Designees have consented to be nominated at such annual meeting or special meeting, each member

Affiliates, would in the aggregate, beneficially own more than 9.99% of the then outstanding Common Shares; provided that, for purposes of this Section 3(a)(i), no person shall be, or be deemed to be, the "beneficial owner" of, or to "beneficially own," any securities beneficially owned by any director of the Company to the extent such securities were acquired directly from the Company by such director as or pursuant to director compensation for serving as a director of the Company;

(ii) form or join in a partnership, limited partnership, syndicate or a "group" as defined under Section 13(d) of the Exchange Act, with respect to the securities of the Company;

(iii) present (or request to present) at any annual meeting or any special meeting of the Company's shareholders, any proposal for consideration for action by shareholders or engage in any solicitation of proxies or consents or become a "participant" in a "solicitation" (as such terms are defined in Regulation 14A under the Exchange Act) of proxies or consents (including, without limitation, any solicitation of consents that seeks to call a special meeting of shareholders) or, except as provided in this Agreement, otherwise publicly propose (or publicly request to propose) any nominee for election to the Board or seek representation on the Board or the removal of any member of the Board;

(iv) grant any proxy, consent or other authority to vote with respect to any matters (other than to the named proxies included in the Company's proxy card for any annual meeting or special meeting of shareholders) or deposit any Common Shares in a voting trust or subject them to a voting agreement or other arrangement of similar effect (excluding customary brokerage accounts, margin accounts, prime brokerage accounts and the like), in each case, except for the voting obligations provided in Sections 2(a) or (b);

(v) call or seek to call any special meeting of the Company or action by consent resolutions;

(vi) institute, solicit, assist or join, as a party, any litigation, arbitration or other proceeding against or involving the Company (other than to enforce the provisions of this Agreement);

(vii) separately or in conjunction with any other person in which it is or proposes to be either a principal, partner or financing source or is acting or proposes to act as broker or agent for compensation, submit a proposal for or offer of (with or without conditions), any Extraordinary Transaction (as defined below); provided that the Icahn Group shall be permitted to sell or tender their Common Shares, and otherwise receive consideration, pursuant to any Extraordinary Transaction which is made for all Common Shares and is available on the same terms to the holders of all Common Shares; and provided further that (A) if a third party (other than the Icahn Group or an Icahn Affiliate) commences a tender offer or exchange offer for all of the outstanding Common Shares that is not rejected by the Board in its Recommendation Statement on Schedule 14D-9, then the Icahn Group shall similarly be permitted to make an offer for the Company or

business days following the receipt of written notice from the Company specifying any such breach, neither the Company nor any of its Affiliates or Associates (including such persons' officers, directors and persons holding substantially similar positions however titled) shall make, or cause to be made, by press release or similar public statement, including to the press or media (including social media), or in an SEC or other public filing, any statement or announcement that disparages (as distinct from objective statements reflecting business criticism that do not address employees, officers or directors individually or as a group) any member of the Icahn Group or Icahn Affiliates or any of their respective current or former officers or directors.

4. **Public Announcements.** Unless otherwise agreed, no earlier than 6:30 a.m., New York City time, on the first trading day after the date of this Agreement, the Company shall announce the execution of this Agreement by means of a press release in the form attached to this Agreement as **Exhibit B** (the "**Press Release**"). The Icahn Group will not issue a separate press release. During the Standstill Period, the Company shall have an opportunity to review in advance any Schedule 13D filing made by the Icahn Group on or after the date of this Agreement, and the Icahn Group shall have an opportunity to review in advance the Form 8-K filing to be made by the Company with respect to this Agreement. The Icahn Group understands that the Company may notify certain state regulatory authorities in advance of the issuance of the Press Release.

5. **Confidentiality Agreement.** The Company agrees that: (i) the Icahn Designees are permitted to and may provide confidential information subject to and in accordance with the terms of the confidentiality agreement in the form attached to this Agreement as **Exhibit C** (the "**Confidentiality Agreement**") (which the Icahn Group agrees to execute and deliver to the Company and cause the Icahn Designees (and Replacement Designees) to abide by) and (ii) the Company will execute and deliver the Confidentiality Agreement to the Icahn Group substantially contemporaneously with execution and delivery thereof by the other signatories thereto. At any time an Icahn Designee is a member of the Board, the Board shall not adopt a policy precluding members of the Board from speaking to Carl Icahn with respect to non-privileged matters, and the Company confirms that it will advise members of the Board, including the Icahn Designees, that they may, but are not obligated to, speak to Carl Icahn (but subject to the Confidentiality Agreement), if they are willing to do so and subject to their fiduciary duties and Company Policies (but may caution them regarding specific matters, if any, that involve conflicts between the Company and the Icahn Group or involve any privileged matters). Further, the Icahn Group acknowledges that it is aware that its obligations under the federal securities laws (as well as stock exchange regulations) prohibit any person who has material, non-public information concerning the Company, from trading, purchasing or selling the Company's securities when in possession of such information and from communicating such information to any other person or entity under circumstances in which it is reasonably foreseeable that such person or entity is likely to purchase or sell such securities in reliance upon such information.

6. **Representations and Warranties of All Parties.** Each of the parties represents and warrants to the other party that: (a) such party has all requisite corporate, entity or other power and authority to execute and deliver this Agreement and to perform its obligations hereunder; (b) this Agreement has been duly and validly authorized, executed and delivered by it and is a valid and binding obligation of such party, enforceable against such party in accordance with its terms; and (c) this Agreement will not result in a violation of any terms or conditions of any agreements to which such person is a party.

this Agreement or the transactions contemplated by this Agreement, (ii) agrees that it shall not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from any such court, (iii) agrees that it shall not bring any action relating to this Agreement or the transactions contemplated by this Agreement in any court other than the federal or state courts of the State of Ohio, and each of the parties irrevocably waives the right to trial by jury, (iv) agrees to waive any bonding requirement under any applicable law, in the case any other party seeks to enforce the terms by way of equitable relief, and (v) irrevocably consents to service of process by a reputable overnight mail delivery service, signature requested, to the address of such party's principal place of business or as otherwise provided by applicable law. THIS AGREEMENT SHALL BE GOVERNED IN ALL RESPECTS, INCLUDING VALIDITY, INTERPRETATION AND EFFECT, BY THE LAWS OF THE STATE OF OHIO APPLICABLE TO CONTRACTS EXECUTED AND TO BE PERFORMED WHOLLY WITHIN SUCH STATE WITHOUT GIVING EFFECT TO THE CHOICE OF LAW PRINCIPLES OF SUCH STATE.

10. **No Waiver.** Any waiver by any party of a breach of any provision of this Agreement shall not operate as or be construed to be a waiver of any other breach of such provision or of any breach of any other provision of this Agreement. The failure of a party to insist upon strict adherence to any term of this Agreement on one or more occasions shall not be considered a waiver or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

11. **Entire Agreement.** This Agreement and the Confidentiality Agreement contain the entire understanding of the parties with respect to the subject matter hereof and may be amended only by an agreement in writing executed by the parties hereto.

12. **Notices.** All notices, consents, requests, instructions, approvals and other communications provided for herein and all legal process in regard hereto shall be in writing and shall be deemed validly given, made or served, if (a) given by telecopy and email, when such telecopy and email is transmitted to the telecopy number set forth below and sent to the email address set forth below and the appropriate confirmation is received or (b) if given by any other means, when actually received during normal business hours at the address specified in this subsection:

if to the Company:

FirstEnergy Corp.
76 South Main Street
Akron, OH 44308
Attention: Hyun Park, SVP and Chief Legal Officer
mailstop: A-GO-19 / AK-General Office Bldg
Email: hpark@firstenergycorp.com

With copies to (which shall not constitute notice):

Wachtell, Lipton, Rosen & Katz
51 West 52 Street
New York, NY 10019
Attention: Daniel A Neff, David A. Katz, Sabastian V. Niles
Emails: daneff@wlrk.com, dakatz@wlrk.com, svniles@wlrk.com

term "including" shall be deemed to mean "including without limitation" in all instances. In all instances, the term "or" shall not be deemed to be exclusive.

[Signature Pages Follow]

ICAHN GROUP

CARL C. ICAHN
/s/ Carl C. Icahn
Carl C. Icahn

ANDREW TENO
/s/ Andrew Teno
Andrew Teno

JESSE LYNN
/s/ Jesse Lynn
Jesse Lynn

ICAHN PARTNERS LP
By: */s/ Keith Cozza*
Name: Keith Cozza
Title: Chief Operating Officer

ICAHN PARTNERS MASTER FUND LP
By: */s/ Keith Cozza*
Name: Keith Cozza
Title: Chief Operating Officer

ICAHN ENTERPRISES G.P. INC.
By: */s/ Keith Cozza*
Name: Keith Cozza
Title: President and Chief Executive Officer

[Signature Page to Director Appointment and Nomination Agreement between FirstEnergy Corp. and the Icahn Group]

SCHEDULE A

CARL C. ICAHN

ANDREW TENO

JESSE LYNN

ICAHN PARTNERS LP

ICAHN PARTNERS MASTER FUND LP

ICAHN ENTERPRISES G.P. INC.

ICAHN ENTERPRISES HOLDINGS L.P.

IPH GP LLC

ICAHN CAPITAL LP

ICAHN ONSHORE LP

ICAHN OFFSHORE LP

BECKTON CORP.

EXHIBIT B

FirstEnergy Corp.
76 South Main Street
Akron, Ohio 44308
www.firstenergycorp.com

For Release: March 16, 2021

News Media Contact:
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lyndsey.estin@kekstcnc.com

Investor Relations Contact:
Irene Prezelj
(330) 384-3859

FirstEnergy Announces Agreement with Icahn Capital

Two New Directors to Be Appointed to FirstEnergy Board

Icahn Capital to Support All FirstEnergy Nominees for Election at 2021 Annual Meeting

Akron, Ohio – FirstEnergy Corp. (NYSE: FE) today announced that it has entered into an agreement with Icahn Capital to add two new members to the company's Board of Directors. Following these additions, FirstEnergy's Board will have 14 directors.

Under the terms of the agreement, FirstEnergy will appoint Andrew Teno and Jesse Lynn, both of whom are employees of Icahn Capital, to the Board effective March 18, 2021. FirstEnergy has also agreed to include Teno and Lynn on its recommended slate of nominees for election at the company's upcoming 2021 Annual Meeting of Shareholders. These appointments are subject to certain regulatory approvals. Therefore, until regulatory approvals are received, the two Icahn Capital directors will not have voting rights. The agreement includes provisions regarding voting, standstill restrictions, and other matters, and also provides that Mr. Icahn and his associates will not exercise substantial influence or control over FirstEnergy or any of its subsidiaries. The agreement will be filed by the company on a Current Report on Form 8-K with the U.S. Securities and Exchange Commission.

"We are pleased to have reached this agreement with Icahn Capital," said Donald T. Misheff, non-executive chairman of FirstEnergy. "Our Board and management team have been taking decisive actions to address recent challenges and rebuild trust with key stakeholders. We welcome Messrs. Teno and Lynn joining our Board deliberations as we continue to implement initiatives to enhance shareholder value and advance FirstEnergy into a more resilient, industry-leading organization of the future."

"We look forward to working with our new directors and the rest of the Board on the priorities for FirstEnergy and building on the meaningful steps we have already taken to drive performance, engage in

About Jesse Lynn

Jesse A. Lynn has been general counsel of Icahn Enterprises L.P., a diversified holding company engaged in a variety of businesses, including investment, energy, automotive, food packaging, metals, real estate, home fashion and pharma, since 2014. From 2004 to 2014, Mr. Lynn was Assistant General Counsel of Icahn Enterprises. Mr. Lynn has been a director of: Cloudera, Inc., a company that provides a software platform for data engineering, data warehousing, machine learning and analytics, since August 2019; and Conduent Incorporated, a provider of business process outsourcing services, since April 2019. Mr. Lynn was previously a director of: Herbalife Nutrition Ltd., a nutrition company, from 2014 to January 2021; and The Manitowoc Company, Inc., a capital goods manufacturer, from April 2015 to February 2018. Prior to joining Icahn, Mr. Lynn worked as an associate in the New York office of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. in its business and finance department from 2000 until 2004. From 1996 until 2000, Mr. Lynn was an associate in the corporate group at Gordon Altman Butowsky Weitzen Shalov & Wein. Mr. Lynn received a Bachelor of Arts degree from the University of Michigan and a Juris Doctor from the Boston University School of Law.

FirstEnergy is dedicated to integrity, safety, reliability and operational excellence. Its 10 electric distribution companies form one of the nation's largest investor-owned electric systems, serving customers in Ohio, Pennsylvania, New Jersey, West Virginia, Maryland and New York. The company's transmission subsidiaries operate approximately 24,500 miles of transmission lines that connect the Midwest and Mid-Atlantic regions. Follow FirstEnergy online at www.firstenergycorp.com. Follow FirstEnergy on Twitter: @FirstEnergyCorp.

Forward-Looking Statements: This release includes forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995 based on information currently available to management. Such statements are subject to certain risks and uncertainties and readers are cautioned not to place undue reliance on these forward-looking statements. These statements include declarations regarding management's intents, beliefs and current expectations. These statements typically contain, but are not limited to, the terms "anticipate," "potential," "expect," "forecast," "target," "will," "intend," "believe," "project," "estimate," "plan" and similar words. Forward-looking statements involve estimates, assumptions, known and unknown risks, uncertainties and other factors that may cause actual results, performance or achievements to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements, which may include the following: the results of our ongoing internal investigation matters and evaluation of our controls framework and remediation of our material weakness in internal control over financial reporting; the risks and uncertainties associated with government investigations regarding Ohio House Bill 6 and related matters including potential adverse impacts on federal or state regulatory matters including, but not limited to, matters relating to rates; the risks and uncertainties associated with litigation, arbitration, mediation and similar proceedings; legislative and regulatory developments, including, but not limited to, matters related to rates, compliance and enforcement activity; the ability to accomplish or realize anticipated benefits from strategic and financial goals, including, but not limited to, maintaining financial flexibility, overcoming current uncertainties and challenges associated with the ongoing governmental investigations, executing our transmission and distribution investment plans, controlling costs, improving our credit metrics, strengthening our balance sheet and growing earnings; economic and weather conditions affecting future

EXHIBIT C
CONFIDENTIALITY AGREEMENT

March 18, 2021

To: Each of the persons or entities listed on Schedule A (the "Icahn Group" or "you")

Ladies and Gentlemen:

This letter agreement shall become effective upon the appointment of any Icahn Designee to the Board of Directors (the "Board") of FirstEnergy Corp. (the "Company"). Capitalized terms used but not otherwise defined herein shall have the meanings given to such terms in the Director Appointment and Nomination Agreement (the "Nomination Agreement"), dated as of March 16, 2021, among the Company and the Icahn Group. The Company understands and agrees that, subject to the terms of, and in accordance with, this letter agreement, an Icahn Designee may, if and to the extent he or she desires to do so, disclose non-privileged information he or she obtains while serving as a member of the Board to you and your Representatives (as hereinafter defined), and may discuss such information with any and all such persons, subject to the terms and conditions of this letter agreement, and that other members of the Board may similarly disclose information to you if they wish to do so, subject to the Company Policies. As a result, you may receive certain non-public information regarding the Company. You acknowledge that this information is proprietary to the Company and may include trade secrets or other business information the disclosure of which could harm the Company. In consideration for, and as a condition of, the information being furnished to you and your agents, affiliates, representatives, attorneys, advisors, directors, officers or employees (collectively, the "Representatives"), subject to the restrictions in paragraph 2, you agree to treat any and all information concerning or relating to the Company or any of its subsidiaries or current or former affiliates that is furnished to you or your Representatives (regardless of the manner in which it is furnished, including in written or electronic format or orally, gathered by visual inspection or otherwise) by any Icahn Designee, or by or on behalf of the Company or any Company Representative (as defined below), including discussions or matters considered in meetings of the Board or Board committees, together with any notes, analyses, reports, models, compilations, studies, interpretations, documents, records or extracts thereof containing, referring, relating to, based upon or derived from such information, in whole or in part (collectively, "Evaluation Material"), in accordance with the provisions of this letter agreement, and to take or abstain from taking the other actions hereinafter set forth.

1. The term "Evaluation Material" does not include information that (i) is or has become generally available to the public other than as a result of a direct or indirect disclosure by you or your Representatives in violation of this letter agreement or any other obligation of confidentiality, (ii) was within your or any of your Representatives' possession on a non-confidential basis prior to its being furnished to you by any Icahn Designee, or by or on behalf of the Company or its agents, representatives, attorneys, advisors, directors (other than the Icahn Designees), officers or employees (collectively, the "Company Representatives"), or (iii) is received from a source other than any Icahn Designee, the Company or any of the Company Representatives; *provided*, that in the case of (ii) or (iii) above, the source of such information was not believed by you, after reasonable inquiry, to be bound by a confidentiality agreement with or other contractual, legal or fiduciary obligation of confidentiality to the Company or any other person with respect to such information at the time the information was disclosed to you.

not in any way apply to any Icahn Designee acting in his or her capacity as a Board member (nor shall it apply to any other Board members).

5. All Evaluation Material shall remain the property of the Company. Neither you nor any of your Representatives shall by virtue of any disclosure of or your use of any Evaluation Material acquire any rights with respect thereto, all of which rights (including all intellectual property rights) shall remain exclusively with the Company. At any time after the date on which no Icahn Designee is a director of the Company, upon the request of the Company for any reason, you will promptly return to the Company or destroy all hard copies of the Evaluation Material and use reasonable best efforts to permanently erase or delete all electronic copies of the Evaluation Material in your or any of your Representatives' possession or control (and, upon the request of the Company, shall promptly certify to the Company that such Evaluation Material has been erased or deleted, as the case may be). Notwithstanding the foregoing, the obligation to return or destroy Evaluation Material shall not cover information (i) that is maintained on routine computer system backup tapes, disks or other backup storage devices as long as such backed-up information is not used, disclosed, or otherwise recovered from such backup devices or (ii) retained on a confidential basis solely to the extent required to comply with applicable law and/or any internal record retention requirements; provided that such materials referenced in this sentence shall remain subject to the terms of this letter agreement applicable to Evaluation Material, and you and your Representatives will continue to be bound by the obligations contained herein for as long as any such materials are retained by you or your Representatives.

6. You acknowledge, and will advise your Representatives, that the Evaluation Material may constitute material non-public information under applicable federal or state securities laws, and you agree that you shall not, and you shall use reasonable best efforts to ensure that your Representatives do not, trade or engage in any derivative or other transaction in the Common Shares or any of the Company's other securities on the basis of such information in violation of such laws.

7. You hereby represent and warrant to the Company that (i) you have all requisite company power and authority to execute and deliver this letter agreement and to perform your obligations hereunder, (ii) this letter agreement has been duly authorized, executed and delivered by you, and is a valid and binding obligation, enforceable against you in accordance with its terms, (iii) this letter agreement will not result in a violation of any terms or conditions of any agreements to which you are a party or by which you may otherwise be bound, and (iv) your entry into this letter agreement does not require approval by any owners or holders of any equity or other interest in you (except as has already been obtained).

8. Any waiver by the Company of a breach of any provision of this letter agreement shall not operate as or be construed to be a waiver of any other breach of such provision or of any breach of any other provision of this letter agreement. The failure of the Company to insist upon strict adherence to any term of this letter agreement on one or more occasions shall not be considered a waiver or deprive the Company of the right thereafter to insist upon strict adherence to that term or any other term of this letter agreement.

9. You acknowledge and agree that the value of the Evaluation Material to the Company is unique and substantial, but may be impractical or difficult to assess in monetary terms. You further acknowledge and agree that in the event of an actual or threatened violation of this letter agreement, immediate and irreparable harm or injury would be caused for which money damages

New York, NY 10019
Attention: Daniel A Neff, David A. Katz, Sabastian V. Niles
Emails: daneff@wlrk.com, dakatz@wlrk.com, svniles@wlrk.com

if to the Icahn Group:

Icahn Associates Corp.
16690 Collins Avenue, Penthouse Suite
Sunny Isles Beach, FL 33160
Attention: Keith Cozza, President and CEO
Email: kcozza@sfire.com

With a copy to (which shall not constitute notice):

Icahn Associates Corp.
16690 Collins Avenue, Penthouse Suite
Sunny Isles Beach, FL 33160
Attention: Jesse A. Lynn, General Counsel
Email: jlynn@sfire.com

13. If at any time subsequent to the date hereof, any provision of this letter agreement shall be held by any court of competent jurisdiction to be illegal, void or unenforceable, such provision shall be of no force and effect, but the illegality or unenforceability of such provision shall have no effect upon the legality or enforceability of any other provision of this letter agreement.

14. This letter agreement may be executed (including by facsimile or PDF) in two or more counterparts which together shall constitute a single agreement.

15. This letter agreement and the rights and obligations herein may not be assigned or otherwise transferred, in whole or in part, by you without the express written consent of the Company. This letter agreement, however, shall be binding on successors of the parties to this letter agreement.

16. The Icahn Group shall cause any Replacement Designee appointed to the Board pursuant to the Nomination Agreement to execute a copy of this letter agreement.

17. This letter agreement shall expire three (3) years from the date on which no Icahn Designee remains a director of the Company; except that you shall maintain in accordance with the confidentiality obligations set forth in this letter agreement any Evaluation Material (i) constituting trade secrets for such longer time as such information constitutes a trade secret of the Company as defined under 18 U.S.C. § 1839(3) and/or (ii) retained pursuant to Section 5.

18. No licenses or rights under any patent, copyright, trademark, or trade secret are granted or are to be implied by this letter agreement.

19. Each of the parties acknowledges that it has been represented by counsel of its choice throughout all negotiations that have preceded the execution of this letter agreement, and that it has executed the same with the advice of said counsel. Each party and its counsel cooperated and participated in the drafting and preparation of this agreement and the documents referred to herein, and any

Please confirm your agreement with the foregoing by signing and returning one copy of this letter agreement to the undersigned, whereupon this letter agreement shall become a binding agreement between you and the Company.

Very truly yours,

FIRSTENERGY CORP

By: ___

Name:
Title:

Accepted and agreed as of the date first written above:

CARL C. ICAHN

___
Carl C. Icahn

ANDREW TENO

___
Andrew Teno

JESSE LYNN

___
Jesse Lynn

ICAHN PARTNERS LP
By: ___
Name: Keith Cozza
Title: Chief Operating Officer

[Signature Page to Confidentiality Agreement between FirstEnergy Corp. and the Icahn Group]

ICAHN OFFSHORE LP
By: ___
Name: Keith Cozza
Title: Chief Operating Officer

BECKTON CORP
By: ___
Name: Keith Cozza
Title: Secretary; Treasurer

[Signature Page to Confidentiality Agreement between FirstEnergy Corp. and the Icahn Group]

EXHIBIT D

Registration Rights

1. Demand Registration Rights. Each member of the Icahn Group (each, a "**Demand Party**") shall each be entitled to two (2) demand registrations (whether or not underwritten, with the managing underwriter, if any, to be chosen by the Company, which managing underwriter shall be of national standing and reasonably acceptable to the Demand Parties participating in such registration) only with respect to those Common Shares that the Icahn Group is permitted to acquire pursuant to Section 3(a)(i) (the "Registrable Shares"); provided that (A) the Company shall only be required to effect one (1) demand registration made by the Icahn Group (the "**Demanding Holder**") in any 18-month period and no more than two (2) demand registrations in the aggregate by all members of the Icahn Group and (B) each registration in respect of such demand notice must include, in the aggregate (based solely on the Common Shares requested to be included in such registration by all Demand Parties participating in such registration), at least 5 million Common Shares. No demand registration shall be made prior to the later of December 1, 2021 or the date the Company is eligible to file a Registration Statement on Form S-3. The Demanding Holder shall, subject to clause (2) below (to the extent other Demand Parties exercise their piggyback registration rights with respect thereto), have first priority to register and to sell all of the securities that such Demanding Holder requested to be registered and/or sold pursuant to any of its demand rights before the Company or any holder of Common Shares that owns at that time at least 10% of the then outstanding Common Shares and is party to a registration rights agreement with the Company other than the Demand Parties (a "**10% Holder**") shall be entitled to participate in any such demand registration or sales pursuant to such demand registration, provided that the Company or any such 10% Holder may participate only if such participation would not, in the determination of the managing underwriter, adversely affect the price or success of such Demanding Holder's demand registration. Furthermore, from the date that the Demanding Holder delivers a notice to exercise a demand registration until the conclusion of such offering (for a total period of up to 90 days), the Company shall not register any of its Common Shares for sale for its own account or for the account of any other person other than as permitted in clause (2) below (with customary exceptions to be negotiated and set out in the Registration Rights Agreement, including business combination transactions, dividend reinvestment plans, stock purchase plans, and employee benefit plans, which shall include, without limitation, any of the Company' incentive compensation plan, FirstEnergy Corp. Savings Plan and the FirstEnergy Corp. Master Pension Plan).

2. Piggyback Registration Rights. If the Company at any time proposes to register for sale or sells any Common Shares (or securities convertible into or exchangeable for Common Shares), pursuant to a registration statement, including in each case pursuant to any shelf registration statement (including pursuant to clause (3) below) and including by effecting any underwritten public offering, for its own account or for the account of any other person (including a Demand Party) (collectively, an "**Offering**") (with customary exceptions to be negotiated and set out in the Registration Rights Agreement, including business combination transactions, dividend reinvestment plans, stock purchase plans, and employee benefit plans, which shall include, without limitation, any of the Company' incentive compensation plan, FirstEnergy Corp. Savings Plan and the FirstEnergy Corp. Master Pension Plan), each Demand Party shall be entitled to participate in such Offering; provided that the party who initiated such Offering (whether the Company, a Demand Party or another person entitled to registration rights) (the "**Initiating Party**") shall have first priority to register and sell all of such securities that such Initiating Party

the Shelf Registration Statement shall count), the Company shall be required to effect an underwritten public offering (with the managing underwriter to be chosen by the Company, which managing underwriter shall be of national standing and reasonably acceptable to the Demand Parties participating in such offering) pursuant to a shelf registration statement if the Demand Party requests, or the Demand Parties collectively request, to sell at least 5 million Common Shares held thereby; provided that the Company shall not be required to effect more than one underwritten offering under the Shelf Registration Statement in any 18-month period. If during the 30day period prior to the date that the Demand Party initiates an underwritten public offering under any Shelf Registration Statement, the Company has already initiated, and is pursuing in good faith at the time the Demand Party makes such initiation, an underwritten public offering for its own account (**"Company Offering"**), then in such event, the Demand Parties shall cease their process for an underwritten public offering and the Company shall have first priority to sell all of the securities that the Company contemplated in such Company Offering, and the Demand Parties and any 10% Holder shall thereafter be entitled to participate in the Company Offering on a pro rata basis based on their relative percentage interests so long as such participation would not, in the determination of the managing underwriter, adversely affect the price or success of the Company Offering; provided that if the Company Offering is not completed within 90 days from the date that the Company notifies the Demand Parties of such Company Offering, each Demand Party shall be permitted to initiate an underwritten offering which shall no longer be pre-empted by the proposed Company Offering as provided in this sentence. For the avoidance of doubt, if at the time the Demand Party initiates an underwritten public offering there is no Company Offering and no 10% Holder has initiated an underwritten public offering, then the Demand Parties shall have first priority to sell, on a pro rata basis with one another based on their relative percentage interests in the Company, all of the securities that the Demand Parties request to be sold before the Company or any 10% Holder shall be entitled to participate in any such underwritten public offering, and the Company or such 10% Holder may participate only so long as such participation would not, in the determination of the managing underwriter, adversely affect the price or success of the Demand Party's initiated underwritten public offering. No Shelf Request shall be made prior to the later of December 1, 2021 or the date the Company is eligible to file a Registration Statement on Form S3.

4. Term. The registration rights described above shall terminate simultaneously with the termination of the Director Appointment and Nomination Agreement in accordance with Section 9 of the Agreement.

5. Expenses. In connection with any offerings pursuant to a Registration Statement, the participating Demand Parties shall pay 100% (unless other persons are offering Common Shares in such Registration Statement, in which case, the participating Demand Parties and such other person(s) shall pay on a pro rata basis in proportion to the number of Common Shares included by the participating Demand Parties and such persons in the Registration Statement) of (i) all registration and filing fees, (ii) all fees and expenses of compliance with state securities or "blue sky" laws (including reasonable fees and disbursements of counsel in connection with "blue sky" laws qualifications of the Common Shares), (iii) printing and duplicating expenses, (iv) fees and expenses of independent accountants retained by the Company for any comfort letters or costs associated with any required special audits, (v) the reasonable fees and expenses of any special experts retained by the Company and agreed to by the participating Demand Parties, (vi) fees and expenses in connection with any review of underwriting arrangements by FINRA, (vii) fees and expenses in connection with listing, if applicable, the Common Shares on a securities exchange or the NYSE, (viii) all duplicating, distribution and delivery expenses, (ix) any underwriting fees,