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October 15, 2021

Andrew S. Johnston  
Executive Secretary  
Public Service Commission  
of Maryland  
6 St. Paul Street, 16<sup>th</sup> Floor  
Baltimore, MD 21202

**Re: CN 9667 – OPC Motion to Compel Potomac Edison to Respond to  
Certain Discovery Requests**

Dear Mr. Johnston,

Through this letter, OPC requests that the Commission direct Potomac Edison to respond to six of the 43 questions contained in OPC Data Request No. 1.<sup>1</sup> As explained below, Potomac Edison's refusal to respond fully to these questions is unwarranted because each of the six requests seeks information that is directly relevant to the matters set for investigation in Case No. 9667.

We set forth below our efforts to resolve the matters at issue through discussion with the Company, followed by a review of the reasons why the requested relief is warranted in each specific instance.

**BACKGROUND AND ATTEMPTS TO RESOLVE BETWEEN PARTIES**

Commission Order No. 89888 granted in part OPC's request for an investigation and authorized the discovery in three subject areas:

- a. The extent that any results of the scandal have affected, or might in the future affect, Potomac Edison's cost to access funds from FirstEnergy's "money pool";

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<sup>1</sup> These six questions are OPC DR Nos. 1-1, 1-2, 1-10, 1-22, 1-24, and 1-40. The attachments to this Letter ("Confidential Attachment A" and "Attachment B") set forth these six questions and Potomac Edison's objections and responses to them.

b. Whether and to what extent FirstEnergy used, is using, or intends to use any funds from Potomac Edison to pay for the bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy;

c. The extent to which the “Icahn Agreement” may potentially cause the Icahn-appointed directors to exercise “substantial influence” over Potomac Edison as set forth in PUA § 6-105.<sup>2</sup>

OPC sent Data Request (“DR”) Set No. 1 to Potomac Edison on August 17, 2021, seeking information within the parameters laid out by the Commission. Among other things, the requests sought: information about an internal investigation of FirstEnergy’s misconduct and its impact on ratepayers that Potomac Edison referenced in its response to OPC’s petition;<sup>3</sup> communications exchanged between FirstEnergy and Icahn representatives concerning the Icahn Agreement;<sup>4</sup> FirstEnergy board materials subsequent to the execution of the Icahn Agreement;<sup>5</sup> copies of reports that concern the costs associated with FirstEnergy’s misconduct;<sup>6</sup> and an accounting of personnel and legal costs incurred by FirstEnergy or its subsidiaries in responding to FirstEnergy’s scandals.<sup>7</sup>

Potomac Edison sent its response to OPC’s DR Set No. 1 on September 1, 2021, including both confidential and non-confidential attachments.<sup>8</sup> The Company objected on various grounds to all or portions of each of the above-referenced questions and failed to provide complete answers to certain questions.

In an effort to resolve this dispute without troubling the Commission, OPC sent a letter to Potomac Edison on September 10, 2021, explaining why the responses to DR Nos. 1-2, 1-10, 1-22, and 1-24 were inadequate and requesting that Potomac Edison supplement its responses.<sup>9</sup> Receiving no response to its letter by September 15, OPC’s

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<sup>2</sup> Commission Order 89888 (CN 9667, July 26, 2021) at 7.

<sup>3</sup> See Confidential Attachment A, OPC DR 1-1 at 1, and Attachment B, OPC DR 1-2 at 1.

<sup>4</sup> See Attachment B, OPC DR 1-10 at 3.

<sup>5</sup> *Id.*, OPC DR 1-22 at 4.

<sup>6</sup> *Id.*, OPC DR 1-24 at 5.

<sup>7</sup> *Id.*, OPC DR 1-40 at 7.

<sup>8</sup> See Confidential Attachment A and Attachment B, Potomac Edison’s responses are listed under each respective DR.

<sup>9</sup> See Attachment C, OPC Letter to Potomac Edison Re: Potomac Edison’s September 1 Responses to Set 1 dated September 10, 2021.

undersigned counsel called counsel for Potomac Edison to inquire concerning the status of the request for supplementation. During this call, counsel indicated that Potomac Edison would provide a response to OPC's September 10<sup>th</sup> letter the following week. On September 22, 2021, Potomac Edison provided a written response to OPC's letter, reiterating all of its original objections and providing additional reasons for its refusal to answer these requests.<sup>10</sup>

In a further attempt to resolve the dispute surrounding DRs 1-2, 1-10, 1-22, and 1-24, OPC and Potomac Edison counsel met by phone on October 1, 2021. During this call, Potomac Edison suggested that if OPC were willing to narrow certain requests, it might be willing to answer them. OPC responded by stating in an October 6, 2021, letter that it would agree to narrow the scope of DRs 1-2, 1-22, and 1-24, provided that Potomac Edison provide "more information."<sup>11</sup>

On October 11, 2021, Potomac Edison responded (by letter), indicating for DRs 1-2, 1-22, and 1-24 that the narrowed scope of the questions would not in fact lead to the production of any additional substantive information. Potomac Edison send formal supplementation for these DRs on October 15, 2021, consistent with their letter.<sup>12</sup> Potomac Edison did not provide any additional information responsive to the DRs at issue.

Finally, during the October 1, 2021, telephone meeting OPC also sought supplemental responses to DRs 1-1 and 1-40. On October 5, 2021, OPC sent an email to counsel for Potomac Edison requesting a more complete answer to DR 1-1 and a substantive response to DR 1-40, because Potomac Edison's sole original response to DR 1-40 was an objection.<sup>13</sup> In its letter dated October 11, 2021, and in supplemental discovery on October 15, 2021, Potomac Edison stood by its original responses and declined to provide the information requested.<sup>14</sup>

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<sup>10</sup> See Attachment B, Potomac Edison's supplemental responses are listed under each respective DR.

<sup>11</sup> See Attachment D, Email from OPC to Potomac Edison Re: Revised Data Requests from Set 1 dated October 6, 2021.

<sup>12</sup> See Attachment B, Potomac Edison's second supplemental responses are listed under each respective DR. Potomac Edison's response to DR 1-22, at 4, which requested board materials from board meetings after the Icahn Agreement was executed, indicates that it identified that the information is limited to showing that the Icahn board members were present at board meetings. This is not new information, and is not a substantive reply to OPC's data request.

<sup>13</sup> See Attachment E, Email from OPC to Potomac Edison Re: Follow-Up to Friday Call dated October 5, 2021.

<sup>14</sup> See Confidential Attachment A at 2, and Attachment B at 7.

Given these circumstances, OPC now moves the Commission to compel Potomac Edison to respond to OPC DRs 1-1, 1-2, 1-10, 1-22, 1-24, 1-39 and 1-40.

## ARGUMENT

Each of the OPC data requests that are the subject of this motion is appropriately tailored to elicit information relevant to the matters identified by the Commission in Order No. 89888. The questions can be grouped into two categories – *first*, those seeking information related to Commission inquiry (b) regarding FirstEnergy’s use of Potomac Edison funds in connection with its misconduct; and, *second*, those seeking information related to Commission inquiry (c) regarding the Icahn Agreement. OPC sets out its justification for seeking complete responses to each of the requests in each category below.

It should be noted at the outset that FirstEnergy has identified cooperation in regulatory matters as part of its planned efforts to restore its and Potomac Edison’s credit ratings to investment grade. Although OPC has endeavored to obtain necessary information from Potomac Edison, this investigation has not evinced meaningful cooperation on the part of FirstEnergy and Potomac Edison. Instead, Potomac Edison has set out in pleadings and discovery responses a self-serving and selective flow of information from FirstEnergy to Potomac Edison in an effort to forestall further regulatory action. Whenever FirstEnergy desires Potomac Edison to provide information from FirstEnergy or its affiliates concerning its internal investigation(s), that information is forthcoming.<sup>15</sup> But when OPC has sought to investigate further into those very same matters, it by and large has been met with the rote responses that the information sought is not in the possession of Potomac Edison, is privileged, or is outside the scope of this proceeding. The Commission should not countenance this shell game, where FirstEnergy and Potomac Edison engage in sword and shield behavior by selectively providing information concerning investigations and matters otherwise claimed to be privileged.

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<sup>15</sup> See Footnote 22, *infra*.

**I. Data Requests 1-1, 1-2, 1-24, and 1-40 appropriately seek information that is relevant to FirstEnergy’s use of Potomac Edison funds in connection with its misconduct (Commission inquiry (b)).**

The Commission authorized discovery to investigate whether “FirstEnergy used, is using, or intends to use” Potomac Edison funds to pay for any costs associated with FirstEnergy’s misconduct.<sup>16</sup> Contrary to Potomac Edison’s various objections to these questions, the data requests at issue seek documents or information that are central to answering this question.

DRs 1-1 and 1-2 request information directly referenced by Potomac Edison in connection with this case. In its response to OPC’s petition to initiate this investigation, Potomac Edison stated that “FirstEnergy’s Board of Directors conducted an independent internal investigation in light of the government investigations currently underway in Ohio.”<sup>17</sup> That investigation purportedly revealed “certain transactions, including vendor services, that were either improperly classified, misallocated, or lacked proper supporting documentation,” about \$38,000 of which were included in Potomac Edison base rates.<sup>18</sup> Potomac Edison made this statement in an attempt to convince the Commission to reject OPC’s request for an investigation. The Commission instead authorized discovery concerning this precise subject: the use by FirstEnergy of Potomac Edison funds to engage in a series of allegedly illegal activities.

DRs 1-1 and 1-2 are straightforward questions that seek documentation concerning the “independent internal investigation.” Potomac Edison largely refused to provide any of the documentation requested on the grounds that the requests exceed the scope of the proceeding, the materials are protected by attorney-client privilege and work product doctrine, and the materials are outside of the possession, custody, or control of Potomac Edison because the investigation was conducted by FirstEnergy. None of these objections are valid.

The information sought is squarely within the scope of the proceeding because Potomac Edison itself introduced the details of the internal investigation in its response to address the very inquiry now at issue. A privilege is waived by an affirmative act that “put[s] the protected information at issue by making it relevant to the case” and

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<sup>16</sup> Order No. 89888 at 7.

<sup>17</sup> *Potomac Edison’s Response in the Matter of the Petition of People’s Counsel to Investigate the Future of FirstEnergy’s Relationship with Potomac Edison in Light of Recent Events*, June 9, 2021, Mail Log 235692 at 9.

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

“application of the privilege would . . . deny the opposing party access to information vital to his [case].”<sup>19</sup> Having introduced information from the investigation to attempt to satisfy any concerns the Commission may have about Potomac Edison funds being implicated in FirstEnergy’s wrongdoing, Potomac Edison cannot now invoke privilege to shield the documentation of that investigation from OPC and the Commission. As Potomac Edison stated that the investigation uncovered improperly classified transactions, reports of the investigation’s results and any conclusions or actions stemming from the investigation that involve Potomac Edison are necessary to conduct a full examination of how Potomac Edison funds have been or may be used in connection with FirstEnergy’s misconduct.

Potomac Edison further cannot claim that this information is outside of its possession, custody, or control simply because FirstEnergy conducted the investigation.<sup>20</sup> The U.S. District Court for the District of Maryland has long interpreted control to include not just information that a party legally owns, but also information that the party “has the right, authority, or practical ability to obtain . . . from a non-party.”<sup>21</sup> It is clear from FirstEnergy’s significant participation in this proceeding that Potomac Edison has the “practical ability” to obtain the investigation documents from FirstEnergy. Indeed, a majority of the responses to OPC’s DR Set 1 were provided by individuals that hold leadership positions within FirstEnergy, and those responses include FirstEnergy accounting records.<sup>22</sup> Thus, Potomac Edison’s objection that it has no practical ability to obtain information or documents created by FirstEnergy does not hold up. Potomac Edison is wrongly using this objection to provide information to OPC selectively based

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<sup>19</sup> *Parler & Wobbler v. Miles & Stockbridge*, 756 A.2d 526, 542 (Md. 2000).

<sup>20</sup> Federal Rule of Civil Procedure 34 requires a party to produce only those documents that are within the party’s possession, custody, or control. While the Commission is not bound by the Federal Rules, it has in the past requested that parties consider those Rules and the U.S. District Court for the District of Maryland’s Discovery Guidelines as principles guiding conduct in discovery. *See, e.g.*, Commission Order 88585 (CN 9471, Feb. 22, 2018) at 5.

<sup>21</sup> *Goodman v. Praxair Servs., Inc.*, 632 F.Supp.2d 494, 515 (D. Md. 2009) (internal quotations omitted), *see also Steele Software Sys., Corp. v. DataQuick Info. Sys., Inc.*, 237 F.R.D. 561, 563–65 (D. Md. 2006).

<sup>22</sup> For example: OPC DR Nos. 1-3, 1-4, and 1-38 were answered by Ray Valdes, Director of Rates and Regulatory Affairs for FirstEnergy. DR Nos. 1-4 and 1-37 were answered by Mr. Valdes and Art Richards, Director of General Accounting for FirstEnergy. DR Nos. 1-30 through 1-33 were answered by Ermal Fatusha, Director of Capital Markets for FirstEnergy. DR Nos. 1-35 and 1-36 were answered by Hilary Stewart, Manager of Enterprise Risk Management and Risk Control for FirstEnergy. DR Nos. 1-42 and 1-43 were answered by Daniel Dunlap, Assistant Corporate Secretary for FirstEnergy. DR Nos. 1-6, 1-7, 1-8, 1-11, 1-13 – 1-16, and 1-19 – 1-22 were answered by Mary Swann, Corporate Secretary for FirstEnergy.

on what the company deems appropriate rather than what the Commission set as the scope of the proceeding.<sup>23</sup>

DR 1-24 similarly requests copies of reports, including audits, that address or relate to the specific types of expenditures enumerated by the Commission in inquiry (b). Aside from pointing OPC to certain other responses, Potomac Edison largely refused to answer because it claimed that the request exceeds the scope of the proceeding, and that “OPC is not entitled to audits performed by FE.”<sup>24</sup> Considering that Potomac Edison has revealed that a FirstEnergy investigation uncovered expense errors impacting Potomac Edison, it is reasonable to presume that any audits FirstEnergy has conducted related to its misconduct in Ohio would contain information key to answering Commission inquiry (b) and are in the Potomac Edison’s own files. As stated above, FirstEnergy information, documents, and personnel have been selectively made available to OPC at Potomac Edison’s discretion. Plainly, DR 1-24 is centrally relevant to the Commission’s inquiry. Potomac Edison’s conduct in providing only FirstEnergy information that it deems appropriate while precluding OPC’s efforts to assess the propriety of its responses is transparently inequitable.

DR 1-40 also seeks information critical to answering Commission inquiry (b). OPC requests an accounting of legal, consulting, and personnel costs incurred in responding to the FirstEnergy scandals. The request necessarily includes information related to FirstEnergy’s costs, including legal costs, associated with the scandal because that is plainly included in the Commission’s inquiry. A full answer to this request is necessary to investigate whether any of the types of costs that the Commission incorporated into its inquiry have been included in Potomac Edison rates or will be included in a later rate case.

**II. Data Requests 1-10 and 1-22 appropriately seek information that is necessary to answer questions regarding the Icahn Agreement (Commission inquiry (c)).**

The Commission authorized discovery to investigate whether the Icahn Agreement “may potentially cause” the Icahn-appointed directors to wield substantial influence over Potomac Edison as set forth in PUA § 6-105. A straightforward way to investigate this

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<sup>23</sup> Although OPC has propounded follow-up discovery and is seeking to obtain a listing of FirstEnergy Service Company charges to Potomac Edison, OPC is entitled to know, among other things, what standards FirstEnergy used to identify wrongful charges, whether it applied those standards consistently, and what charges it investigated.

<sup>24</sup> See Attachment B at 5.

important subject is to seek related communications. DR 1-10 seeks communications exchanged between the parties concerning the Icahn Agreement. Potomac Edison objects to this request on various grounds. First, Potomac Edison says that the request is outside of the scope of the proceeding. This objection is baseless. Inquiry (c) in Order No. 89888 makes clear that a § 6-105 inquiry is part of this proceeding and subject to discovery. The Commission reiterated in its order directing this discovery that “in approving the merger of Potomac Edison and FirstEnergy, the Commission expressly retained jurisdiction over both applicants to enforce the provisions of the Merger Order.”<sup>25</sup> The Commission has thus already established that it has jurisdiction over FirstEnergy under § 6-105, and it has included the question of whether the Icahn Agreement presents a § 6-105 issue within the scope of this proceeding.

Potomac Edison has also asserted a number of privileges in response to DR 1-10.<sup>26</sup> But none of those privileges apply to the requested communications. In fact, one of Potomac Edison’s asserted privileges – “other communications protected from disclosure”<sup>27</sup> – is invented and has no basis in the law. Despite multiple good faith requests by OPC for Potomac Edison to clarify how the claimed privileges apply, Potomac Edison has provided no clarification.<sup>28</sup>

As further justification for not replying to DR 1-10, Potomac Edison invokes Federal Rule of Evidence (FRE) 408 and a past bench ruling by the Commission regarding settlement negotiations.<sup>29</sup> FRE 408 says that statements made in the course of settling a claim are inadmissible as evidence to prove the validity of the claim. This rule featured in a past discovery dispute before the Commission in which one party sought to discover communications related to a proposed settlement of a merger case between two other parties.<sup>30</sup> The Commission stated that the third party was “not entitled to the back and forth between the parties about how they got [to the settlement terms].”<sup>31</sup> That case’s discovery dispute is easily distinguishable from the current proceeding. DR 1-10 does not request any communications regarding a settlement of litigation before the Commission. Neither FRE 408 nor the Commission’s prior ruling are applicable to communications relating to the execution of a contract. Further, the policy justification cited by Potomac

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<sup>25</sup> Order No. 89888 at 7.

<sup>26</sup> See Attachment B at 3.

<sup>27</sup> *Id.*

<sup>28</sup> OPC has also requested a privilege log to properly document Potomac Edison’s claims of privilege, which has not been provided.

<sup>29</sup> See Attachment B at 3.

<sup>30</sup> See *Discovery Dispute Re Merger of Exelon Corp. and Constellation Energy Grp.* (CN 9271, January 4, 2012).

<sup>31</sup> *Id.* at 58.



Edison for applying FRE 408 and which was at play in the Commission’s prior case – that releasing “settlement communications between non-parties would chill future efforts to resolve disputes”<sup>32</sup> – is not relevant to a contract like the Icahn Agreement, which is not a settlement agreement—nor was it presented to the Commission as such.<sup>33</sup> Instead, Potomac Edison submitted a copy of the agreement to the Commission through a letter providing formal notification of its execution.<sup>34</sup> No approval was sought; to the contrary, the letter states only that “FirstEnergy and Potomac Edison will notify the Commission when the Icahn Designees become authorized to vote under the Agreement.”<sup>35</sup>

OPC requests that Potomac Edison produce communications that instead involve the execution of a contract that implicates § 6-105. In prior cases involving such contracts, the Commission has ordered broad production of documents outside of the four corners of the executed agreement.<sup>36</sup> A broad inquiry into these matters is warranted when transaction documents made available for review reveal “new corporate and economic relationships that, *in context and once further information is reviewed*, might well qualify as an acquisition of substantial influence.”<sup>37</sup> Since the Icahn Agreement has elements that indicate that Carl Icahn and his designees may have obtained the opportunity to wield substantial influence over Potomac Edison, it is paramount that OPC and the Commission have the ability to analyze the understanding between the parties in relationship to that agreement to determine whether that is indeed the case.<sup>38</sup>

Moreover, Potomac Edison has identified particular provisions of the agreement as precluding the Icahn Directors from exercising substantial influence over Potomac Edison. The parties’ inclusion of a provision in the Icahn Agreement expressly

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<sup>32</sup> See Attachment B at 3.

<sup>33</sup> Even in the case of the settlement in CN 9271, the Commission stated that “factual information exchanged during settlement discussions that forms the basis of” testimony in support of a settlement is relevant, and so there is no bright line rule that prohibits a party from discovering any settlement materials. *Discovery Dispute Re Merger* at 59.

<sup>34</sup> The Icahn Agreement was attached to a letter to the Commission from Jeffrey Trout filed on March 31, 2021 (ML No. 234527).

<sup>35</sup> *Id.* at 2.

<sup>36</sup> See, e.g., Commission Order 82407 (CN 9173, January 16, 2009). The Commission ordered parties in that case to “produce documents memorializing the . . . transaction.” *Id.* at 2. The review of those documents led the Commission to conclude that the “question [as to whether the transaction leads to substantial influence] needs further analysis.” *Id.* at 5. The Commission then broadly ordered production of “all confidential schedules for and all documents filed with any other regulatory authorities relating to the proposed . . . transaction, whether or not confidential.” *Id.* at 10.

<sup>37</sup> *Id.* at 6 (emphasis added).

<sup>38</sup> For example, we know based on responses to other discovery requests (not at issue here) that the Icahn-appointed directors have been afforded rights under the Icahn Agreement concerning Board of Director matters that have not been afforded to any of FirstEnergy’s other directors.

addressing the issue of substantial influence is highly unusual, and OPC is entitled to discovery as to how that specific provision – and the entirety of the Agreement – were negotiated. Having already reviewed the Icahn Agreement prior to including inquiry (c) in its Order, it is evident that the Commission was concerned that there may be a substantial influence issue, and it intended discovery to encompass the context and additional information needed to make that determination.

DR 1-22 seeks FirstEnergy board materials created after the execution of the Icahn Agreement. The purpose of the request is to attempt to analyze the level of influence the Icahn directors are already asserting, or could assert, over FirstEnergy board proceedings or matters brought before the board for its attention and consideration. Despite Potomac Edison's objection that this exceeds the scope of the proceeding, the request is again directly and centrally relevant to Commission inquiry (c). What the Icahn directors have access to, say, and do as FirstEnergy board members is critical to evaluating Potomac Edison's statement to the Commission that the Icahn directors will not be permitted to exercise substantial influence.<sup>39</sup>

Potomac Edison has said in its responses that OPC's request is overly broad and should only be answered to the extent such materials referenced Potomac Edison directly.<sup>40</sup> However, the Commission has previously recognized that substantial influence can be exerted by board members over a utility even when the board member has no interaction with matters that are directly connected to that utility.<sup>41</sup> In *Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Company*, the Commission found that a third party, EDF, would have the ability to exercise substantial influence over BGE (a Maryland utility) in part because EDF acquired a seat on the board of BGE's parent company, Constellation.<sup>42</sup> EDF and Constellation attempted to eliminate this ability by agreeing that EDF's board member would be "cordoned off" from any board discussions dealing with BGE, but the Commission stated that they "were not convinced that the separation would totally mitigate the forms of influence that inform our ruling," including "EDF's ability to influence decisions [Constellation] might make."<sup>43</sup> The Commission further observed that its analysis and conclusion were supported by the actual language of § 6-105, which specifies that substantial influence can manifest itself either "directly or indirectly."<sup>44</sup>

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<sup>39</sup> *Potomac Edison's Response* at 16.

<sup>40</sup> *See* Attachment B at 4.

<sup>41</sup> *See, e.g.*, Commission Order 82719 (CN 9173, June 11, 2019).

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.* at 34.

<sup>44</sup> *Id.* at 21.

Similarly, the Icahn directors could exercise influence over Potomac Edison in ways other than asserting direct leverage, including by exerting influence over FirstEnergy's decisions in other areas. To determine whether that is the case, it is necessary to analyze the nature and extent of the Icahn directors' interactions with and influence over the FirstEnergy board as a whole. OPC's request in DR 1-22 is tailored to that purpose.

### CONCLUSION

The questions at issue from OPC's DR No. 1 have been crafted to address issues central to the inquiries set forth for investigation by the Commission in Order No. 89888. As laid out above, Potomac Edison's claims that the information sought is beyond the scope of the proceeding, protected by privilege, or outside of its possession, custody, or control are baseless. For those reasons, OPC respectfully requests that the Commission issue a ruling directing Potomac Edison to provide complete responses to Data Requests 1-1, 1-2, 1-10, 1-22, 1-24, and 1-40.

Respectfully submitted,

Joseph G. Cleaver  
Deputy People's Counsel

/s/ Irene N. Wiggins  
Irene (Niki) Wiggins  
Assistant People's Counsel

cc: All parties of record

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of October, 2021, the foregoing “Motion to Compel Potomac Edison to Respond to Certain Discovery Requests” was either hand-delivered, e-mailed or mailed first-class, postage prepaid to all parties of record to this proceeding.

*/electronic signature/*  
Irene N. Wiggins  
Assistant People’s Counsel

# CONFIDENTIAL ATTACHMENT A

Potomac Edison confidential information has been redacted for public filing.

## Data Request 1-1

### 1-1 OPC Request 8/17/21

In the June 9, 2021, response of Potomac Edison (PE) to the OPC Petition (PE Response), PE Counsel states (at page 9) that PE “has identified less than \$38,000 of such improperly classified or inadequately documented funds that were inadvertently reflected in distribution base rates as a result of the last base rate case.” With respect to this statement, please:

- a. describe the analysis that PE conducted to arrive at this finding, including: an identification of each individual who was involved in the analysis (both internal and external), along with their job title; and a statement of the period of time over which the analysis was conducted;
- b. provide all documentation that supports this statement, including all reports, analyses, studies or assessments conducted by or for PE of the charges “improperly classified or inadequately documented;
- c. provide an explanation of why \$38,000 in charges was “improperly classified or inadequately documented,” and, to the extent not provided in response to questions (a) or (b), provide all documents that contain or provide the basis for this explanation; and
- d. state whether the \$38,000 figure has been finalized, or whether PE is still in the process of confirming or reevaluating its accuracy.

### 1-1 Potomac Edison Response 9/1/21

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[REDACTED]

b.

[REDACTED]

c.

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d.

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**1-1 Potomac Edison Second Supplemental Response 10/15/21**

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OPC-1.1-Attachment A-Confidential

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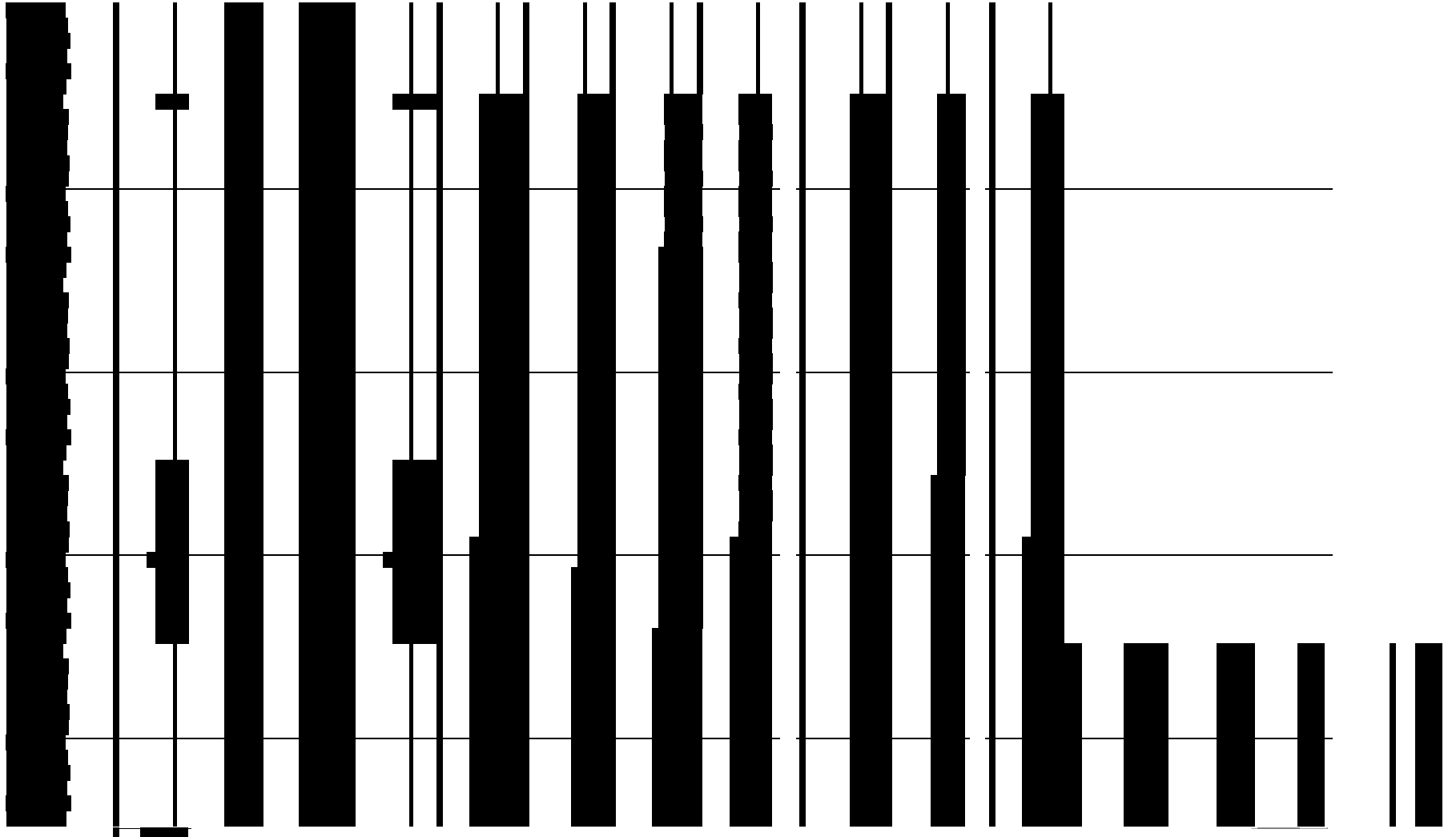
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OPC-1.1-Attachment A-Confidential

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OPC-1.1-Attachment A-Confidential  
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[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
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OPC-1.1-Attachment A-Confidential

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OPC-1.1-Attachment A-Confidential

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OPC-1.1-Attachment A-Confidential

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# ATTACHMENT B

## Data Request 1-2

### 1-2 OPC Request 8/17/21

The PE Response states (at 9): “As a precaution undertaken long before OPC filed its petition, FirstEnergy’s Board of Directors conducted an independent internal investigation in light of the government investigations currently underway in Ohio. In connection with that internal investigation, FirstEnergy identified certain transactions, including vendor services, that were either improperly classified, misallocated, or lacked proper supporting documentation.” In connection with this statement:

- a. were the results of the internal investigation reduced to writing? If so, please provide the report of the results. In addition, please provide all reports, analyses, and communications generated as part of the internal investigation;
- b. please describe the role played by PE management personnel in the conduct of the “internal investigation.” Were PE management personnel interviewed as part of the “internal investigation”? If so, please identify the person or persons, and provide all notes or reports or other writing relating to any such interviews;
- c. did the internal investigation include the possibility of strengthening the current ring-fencing measures in place with respect to PE? If so, please provide all documents that concern or relate to consideration of enhanced ring-fencing; and
- d. did the internal investigation find any wrongdoing or other improper conduct by any PE executive or person operating on behalf of or at the request of PE? If the answer is “no,” please provide the documentary basis for the response. If the answer is (in whole or in part) “yes,” please provide the documentary basis for the response.

### 1-2 Potomac Edison Response 9/1/21

Potomac Edison objects to this request to the extent that it (1) exceeds the scope of this proceeding as set by the Commission; (2) exceeds the scope of the Commission's jurisdiction by demanding the production of detailed information from the internal investigation conducted by FirstEnergy Corp.’s Board of Directors which are protected by the attorney-client privilege and work product doctrine; and (3) seeks information outside the possession, custody, or control of Potomac Edison, which is not and was not involved in FirstEnergy Corp.’s internal investigation. Without waiving the foregoing objection, but rather expressly relying on the same, the Company responds as follows with respect to Potomac Edison:

In response to subpart (d), Potomac Edison states that it is not aware of any finding in connection with FirstEnergy Corp.’s internal investigation that any individual acting on behalf of or at the request of Potomac Edison engaged in any wrongdoing or other improper conduct.

## **1-2 Potomac Edison Supplemental Response 9/22/21**

This Data Request and its subparts seek privileged materials or information of FirstEnergy and its counsel regarding its internal investigation concerning the government's investigation of wrongdoing in the state of Ohio related to House Bill 6.

Despite OPC's request that PE supplement its response to this DR, PE stands by its response provided on September 1, 2021. PE has provided a proper response to this request and its subparts. As OPC is aware, FirstEnergy ("FE") is not a party to these proceedings. Any investigations conducted by FE or its counsel are outside the scope of the three issues identified by the Commission's Order and outside the scope of proper party discovery for these proceedings. The Commission has authorized the parties to this proceeding to "conduct discovery of *Potomac Edison* for no longer than (4) four months" regarding three specific issues. *See* Order No. 89888 ¶ 18 (emphasis added). The Commission has not authorized discovery on FirstEnergy because it is not party to these proceedings. More importantly, PE has already identified for OPC and the Commission all PE funds that PE identified as having been "improperly classified, misallocated, or lacked proper supporting documents." *See* PE Response to OPC DR 1.01 (Confidential). The only misallocated PE funds identified are referenced in OPC DR 1.01. All information regarding those misallocated funds has been produced. PE has further advised OPC and the Commission of PE's intention to refund those monies along with carrying costs and has created a regulatory liability to track those costs that will be refunded to customers in PE's next rate case. Importantly, without waiving any of PE's objections to this Data Request, PE further advised OPC in response to this Data Request that no evidence exists of any wrongdoing or other improper conduct of any PE executive or person operating on behalf of Potomac Edison. Additionally, contrary to OPC's claim, PE cannot unilaterally waive FE's privileges. Again, the Commission narrowed the focus of the proceedings to PE and is permitting parties to "conduct discovery of *Potomac Edison*." As such, PE is not going to produce a privilege log for FE documents as requested.

## **1-2 Potomac Edison Second Supplemental Response 10/15/2021**

Without waiving claims of privilege set forth above, and based on OPC's agreement to narrow this request to seeking "reports (including audits), descriptions, notes, or documents" related to the internal investigation conducted on behalf of FirstEnergy's Board of Directors that "mention or implicate Potomac Edison, Maryland, or any other group that would include Potomac Edison ("PE") or Maryland, even if not explicitly mentioned by name (e.g., FirstEnergy's ("FE") distribution utilities)," PE supplements its answer to state that PE understands that the documents that OPC seeks do not mention or implicate either PE or Maryland.

PE further notes to OPC that additional materials related to "costs allocated from FE to PE" are provided in response to OPC's Data Request Set 3.

## **Data Request 1-10**

### **1-10 OPC Request 8/17/21**

Please provide all communications, including drafts or proposed language, exchanged between or among FirstEnergy (including its agents and representatives) and Mr. Carl Icahn or the Icahn Signatories (including their agents and representatives) concerning the Icahn Agreement.

### **1-10 Potomac Edison Response 9/1/21**

Potomac Edison objects to this request to the extent that it exceeds the scope of this proceeding as set by the Commission. The Company objects to this request to the extent that it requires the disclosure of attorney work product, privileged and confidential communications, legal advice, or other communications protected from disclosure. Without waiving the foregoing objections, but rather expressly relying on the same, Potomac Edison states that there are no responsive non-privileged documents involving Potomac Edison personnel.

### **1-10 Potomac Edison Supplemental Response 9/22/21**

This Data Request seeks documents, including drafts of an agreement between entities that are not parties to these proceedings.

Despite OPC's request that PE supplement its response to this DR, PE stands by its response provided on September 1, 2021. Communications, including "drafts and proposed language," related to the Icahn Agreement are irrelevant to the three narrow issues in this proceeding. *See* Order No. 89888 ¶ 18. The Commission has previously ruled that settlement negotiations were irrelevant to its examination of a settlement agreement and therefore not discoverable. *See Re Merger of Exelon Corp. and Constellation Energy Grp.*, Case No. 9271, at 58-62 (P.S.C. Jan. 4, 2012) (ruling that the third party seeking discovery was "not entitled to the back and forth between the parties about how they got there"). Neither FE nor Icahn is a party to this proceeding. The Commission has authorized the parties to this proceeding to "conduct discovery of *Potomac Edison* for no longer than four (4) months." Order No. 89888 ¶ 18 (emphasis added). OPC has not established how discovery of settlement communications between non-parties to this proceeding would lead to the discovery of admissible evidence that is not otherwise ascertainable through direct inquiry into the terms of the Icahn Agreement.

Furthermore, settlement communications related to the Icahn Agreement will not be produced because Maryland and federal authorities recognize a strong public interest in promoting the private settlement of disputes. *See* Fed. R. Evid. 408 Advisory Committee Notes to 1972 Proposed Rules. Releasing these irrelevant and confidential settlement communications between non-parties would chill future efforts to resolve disputes.

## **Data Request 1-22**

### **1-22 OPC Request 8/17/21**

Please provide all FE Board or FE Board committee notes, agendas, and presentations or reports to the FE Board or FE Board committees subsequent to the execution of the Icahn Agreement on March 16, 2021.

### **1-22 Potomac Edison Response 9/1/21**

Potomac Edison objects to this request to the extent that it exceeds the scope of this proceeding as set by the Commission. Without waiving the foregoing objection, but rather expressly relying on the same, the Company responds as follows with respect to Potomac Edison: Beyond summary reports on the ordinary course of business of the Company and its affiliates, there are no such FE Board or FE Board committee notes, agendas, and presentations or reports specific to Potomac Edison subsequent to the execution of the Icahn Agreement on March 16, 2021.

### **1-22 Potomac Edison Supplemental Response 9/22/21**

This Data Request broadly seeks all board materials related to a non-party to these proceedings.

Despite OPC's request that PE supplement its response to this DR, PE stands by its response provided on September 1, 2021. Neither FE nor the Icahn designees are parties to these proceedings. As FE is not a party, FE's board documents are outside the scope of permissible discovery in these proceedings. However, without waiving those objections, PE has already advised OPC that it understands that other than summary reports on the ordinary course of business, there are no reports specific to PE nor are there any materials related to the "well-being or operation of PE."

### **1-22 Potomac Edison Second Supplemental Response 10/15/21**

Without waiving its objections or claims of privilege, and based specifically on OPC's agreement to narrow this request to "all FE Board or FE Board committee notes, agendas, and presentations or reports to the FE Board or FE Board committee subsequent to the execution of the Icahn Agreement on March 16, 2021 that reference or discuss any of the following: the roles or actions of the Icahn designees, the Icahn Agreement, Potomac Edison, or Maryland," PE understands that the Icahn designees are mentioned in the materials described above only for the purposes of noting their attendance at committee meetings.



## **Data Request 1-24**

### **1-24 OPC Request 8/17/21**

Please provide copies of all reports, including audits, whether conducted by or for FE or PE (or any other FE operating company) that addresses, concerns, or relates to “bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy.” Order No. 89888 at P 18(b).

### **1-24 Potomac Edison Response 9/1/21**

Potomac Edison objects to this request to the extent that it exceeds the scope of this proceeding as set by the Commission. Without waiving the foregoing objection, but rather expressly relying on the same, the Company responds as follows with respect to Potomac Edison:

Please see the responses to OPC-1.01, 1.04 and 1.37

### **1-24 Potomac Edison Supplemental Response 9/22/21**

This Data Request broadly seeks all reports and audits of a non-party to these proceedings regarding costs associated with the misconduct of former employees of that non-party.

Despite OPC’s request that PE supplement its response to this DR, PE stands by its response provided on September 1, 2021. PE’s response is not in bad faith. More importantly, PE has provided OPC with all non-privileged information in its possession regarding the PE funds that were “improperly classified, misallocated or lacked proper supporting documentation.” PE advised OPC regarding the accounts under which those funds were misclassified. *See* PE’s Response to OPC DR 1.01, Attachment A (Confidential). PE has also advised OPC how it intends to refund those amounts to customers in PE’s upcoming rate case and the steps PE has taken to create a regulatory liability to properly track those costs and the compounded interest on those costs. PE has not identified any other PE funds that have been improperly classified. Contrary to OPC’s assertion, OPC is not entitled to audits performed by FE or those of every FE subsidiary that it is not a party to these proceedings.

### **1-24 Potomac Edison Second Supplemental Response 10/15/21**

Without waiving its objections or claims of privilege that the Company set forth earlier, and based on OPC’s agreement to narrow this request to seek “copies of reports (including audits) related to cost associated with FE misconduct that “mention or implicate PE, Maryland, or any other group that would include PE or Maryland,” PE states that it understands that the documents that OPC seeks do not mention or implicate PE or Maryland.

Furthermore, PE refers OPC to its prior response provided on September 1, 2021, wherein PE provided OPC with all non-privileged information in its possession regarding all PE funds that were “improperly classified, misallocated or lacked proper supporting documentation,” and PE advised OPC regarding the accounts under which funds were misclassified.

PE also notes to OPC that the additional cost related information is provided in response to Request No. 3-03 which seeks a record of “all cost allocations from FESC to PE for the period of January 1, 2017 to December 31, 2020.”

## **Data Request 1-40**

### **1-40 OPC Request 8/17/21**

Provide a complete accounting of all internal personnel costs and all outside legal and consulting costs incurred by FE or its subsidiary utilities in responding to (including internal investigations of) the HB6 scandal and Ohio consultancy scandal subsequent to the issuance of the federal Householder indictment on July 21, 2020 and FE's November 19, 2020, SEC Form 10-Q report of the improper consultancy payments. Provide all supporting documents.

### **1-40 Potomac Edison Response 9/1/21**

Potomac Edison objects to this request because it is outside the scope of this proceeding as set by the Commission.

### **1-40 Potomac Edison Supplemental Response 10/15/21**

Without waiving its objections or claims of privilege, in response to Request No. 3-03, PE provides "all cost allocations from FESC to PE for the period of January 1, 2017 to December 31, 2020." The response to OPC DR No. 3-03 reconfirms that no costs (other than those identified in response to DR 1-01 and 1-04) related to "internal personnel or outside legal and consulting" related to HB6 or other Ohio related issues have been included in PE customer rates. The only legal costs that PE is currently incurring are those associated with the current proceeding before the Maryland Commission that was requested by OPC.

# ATTACHMENT C

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September 10, 2021

J. Joseph Curran, III, Esq.  
Venable LLP  
750 E. Pratt Street, Suite 900  
Baltimore, MD 21202

**Re: Potomac Edison's September 1, 2021 Responses to OPC Data Request Set No. 1 to Potomac Edison - Case No. 9667**

Dear Mr. Curran:

I write concerning Potomac Edison's September 1, 2021 non-confidential responses to OPC's First Set of Data Responses. Certain of those responses are inadequate. For the reasons stated here, we ask that Potomac Edison promptly revise its responses to certain data requests as follows:

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## 1. OPC DR 1-02

Other than responding partially to subpart (d), Potomac Edison objects to the remaining parts of this data request on grounds that the subject matter of the request exceeds the scope of this proceeding, would require the release of privileged information, and seeks data outside the custody or control of Potomac Edison. Those objections are unavailing.

The data request seeks information that is directly relevant to matters set for hearing in this proceeding. OPC DR 1-02 seeks discovery concerning the bases for specific representations that Potomac Edison made to the Commission in this proceeding. Potomac Edison's June 9, 2021, reply to OPC's petition initiating this investigation states (at 9): "As a precaution undertaken long before OPC filed its petition, FirstEnergy's Board of Directors conducted an independent internal investigation in light of the government investigations currently underway in Ohio. In connection with that internal investigation, FirstEnergy identified certain transactions, including vendor services, which were either improperly classified, misallocated, or lacked proper supporting documentation."

That assertion relates directly to the subject matter of the investigation. The Commission's July 26, 2021, Order No. 89888 states (at ¶ 18b) that the hearing in this case will include:

[w]hether and to what extent FirstEnergy used, is using, or intends to use any funds from Potomac Edison to pay for the bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy.

Based on “an internal investigation,” Potomac Edison says that it did not use ratepayer funds to “pay for the bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy.” We seek the results of that “internal investigation” to test the basis the Company’s claim. The relevance is therefore obvious.

Privilege is likewise not a defense to discovery in the extant circumstances. Potomac Edison has waived any claim of privilege by affirmatively raising First Energy’s internal investigation into the bribery scandals as a defense in this proceeding. Making this claim while seeking to deflect discovery violates the sword and shield exception to any claim of privilege. A privilege is waived by an affirmative act that “put[s] the protected information at issue by making it relevant to the case” and “application of the privilege would . . . deny the opposing party access to information vital to his [case].” *Parler & Wobbler v. Miles & Stockbridge*, 756 A.2d 526, 542 (Md. 2000). By like token, having interjected this specific claim into the proceeding, Potomac Edison cannot now properly claim that the discovery sought is outside its custody and control.

Finally, to the extent Potomac Edison seeks to assert privileges, it should produce a privilege log sufficient to demonstrate the basis for doing so.

## **2. OPC DR 1-06**

OPC seeks discovery of documents and communications concerning Section 1.(a)(ii) of the Icahn Agreement, the contractual commitment not to exercise substantial influence over FirstEnergy. Potomac Edison responds by stating that it:

objects to this request to the extent that it exceeds the scope of this proceeding as set by the Commission. The Company objects to this request to the extent that it requires the disclosure of attorney work product, privileged and confidential communications, legal advice, or other communications protected from disclosure. Without waiving the foregoing objection, but rather expressly relying on the same, please see the Company’s response to OPC-1.12.

The response is inadequate. PE’s response to OPC DR 1-12 does not provide the information requested and instead simply refers back to statements made by Potomac Edison counsel earlier in this proceeding. The information sought is plainly within the scope of Order, ¶ 18 item c.<sup>1</sup>

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<sup>1</sup> Item c. states that the “parties may conduct discovery of Potomac Edison . . . regarding:”

Potomac Edison's battery of privilege claims are invalid—no privilege exists with respect to communications between First Energy and its representatives and Mr. Icahn and the Icahn Group's representatives. Nor has Potomac Edison established a claim of privilege with respect to its own internal documents, which may well encompass non-privileged business matters. Potomac Edison cannot withhold documents on grounds of confidentiality nor can it invent a general exemption for "communications protected from disclosure," whatever that purports to mean.

### **3. OPC DR 1-07**

This request asks Potomac Edison to "explain the purpose of the Icahn Agreement," and asks "why was it necessary?" Potomac Edison's response states the "purpose of the Icahn Agreement is to appoint the Icahn Designees to the Board of Directors of FirstEnergy Corp. ("FE") and define the obligations of the Icahn Designees and the Icahn Group with respect to FE matters." This answer is not responsive, particularly to the second part of the data request. Potomac Edison's response in no way explains why it was "necessary" for FirstEnergy to create two additional seats on its board for Carl Icahn's associates. In the absence of any objection or assertion of privilege, the Company must provide a complete response to the question asked.

### **4. OPC DR 1-09**

This request asks that Potomac Edison "provide the names and job titles of the individuals involved in the negotiation of the Icahn Agreement." Other than identifying Potomac Edison counsel Jeffrey Trout, Potomac Edison refuses to provide the requested discovery on grounds of privilege, confidentiality, and an invented and not recognized ground "of other communications protected from disclosure." The attorney-client privilege protects the disclosure of certain communications, not the identity of negotiators. Potomac Edison cannot withhold this information on grounds of confidentiality or its invented exemption. Nor was the question intended to be limited to representatives of Potomac Edison (compare with OPC DR 1-14). The identity of the individuals who negotiated the Icahn Agreement, which is centrally relevant to Order, ¶ 18 item c. is material to OPC's investigatory efforts and may provide the basis for deposition(s).

### **5. OPC DR 1-10**

This request asks Potomac Edison to "provide all communications, including drafts or proposed language, exchanged between or among FirstEnergy (including its agents and

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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.

representatives) and Mr. Carl Icahn or the Icahn Signatories (including their agents and representatives) concerning the Icahn Agreement.” Potomac Edison responds by stating that it

objects to this request to the extent that it exceeds the scope of this proceeding as set by the Commission. The Company objects to this request to the extent that it requires the disclosure of attorney work product, privileged and confidential communications, legal advice, or other communications protected from disclosure. Without waiving the foregoing objections, but rather expressly relying on the same, Potomac Edison states that there are no responsive non-privileged documents involving Potomac Edison personnel.

This objection is inadequate. Absent a showing not made here, there is no privilege of any kind that shields from discovery communications between two independent entities—FirstEnergy and Mr. Icahn or the Icahn Signatories—relating to the drafts of or concerning the Icahn Agreement. Potomac Edison’s invented exemption of “other communications protected from disclosure” has no basis in the law. This information should be produced, as it is centrally relevant to the PSC Order, ¶ 18, item c.

#### **6. OPC DR 1-12**

This request asks Potomac Edison to “state whether FE obtained a legal opinion that the terms of the Icahn Agreement (or other measures) would prevent the Icahn Designees from exercising substantial influence over FE or its subsidiaries and affiliates. If so, please provide the opinion.” Rather than answering “yes,” or “no,” Potomac Edison objects on grounds of relevance and privilege. To the extent Potomac Edison does not meaningfully and timely supplement its response, it waives any ability to take such a position in this proceeding hereafter. *See, e.g., Parler & Wobbler v. Miles & Stockbridge*, 756 A.2d 526, 542 (Md. 2000) and case law addressing the sword and shield doctrine generally.

Moreover, Potomac Edison responds by referencing counsel’s discussion of the “issue of substantial influence” in filings made with the Commission. But the request asks specifically about whether a legal opinion was sought concerning whether “the terms of the Icahn Agreement (or other measures) would prevent the Icahn Designees from exercising substantial influence over FE or its subsidiaries and affiliates[,]” and, if so, for a copy of the opinion. The referral to statements by counsel concerning the issue in two PSC filings is not responsive but is instructive. It makes clear that the Company does not regard this subject as privileged or confidential.

#### **7. OPC DR 1-15**

This request asks Potomac Edison to “confirm that the Icahn Group’s control of more than 3% of FE’s stock makes it one of the top five holders of stock in FE.” Potomac Edison does not object, but provides a list only of the top three holders of stock in FE. This response does not answer the question posed. Potomac Edison has waived the right to object on grounds of

relevance and must therefore confirm whether the Icahn Group is either the fourth or the fifth largest FE stockholder.

#### **8. OPC DR 1-22**

This request asks Potomac Edison to “provide all FE Board or FE Board committee notes, agendas, and presentations or reports to the FE Board or FE Board committees subsequent to the execution of the Icahn Agreement on March 16, 2021.” Potomac Edison:

objects to this request to the extent that it exceeds the scope of this proceeding as set by the Commission. Without waiving the foregoing objection, but rather expressly relying on the same, the Company responds as follows with respect to Potomac Edison: Beyond summary reports on the ordinary course of business of the Company and its affiliates, there are no such FE Board or FE Board committee notes, agendas, and presentations or reports specific to Potomac Edison subsequent to the execution of the Icahn Agreement on March 16, 2021.

This response is insufficient. The discovery sought is centrally relevant to Order, ¶ 18 item c. concerning whether the Icahn Directors can exercise substantial influence over Potomac Edison. Among other things, the information sought will demonstrate the issues that come before the FE Board, its committees, and the Icahn Directors, and that those issues are material to the well-being and operation of Potomac Edison, regardless of whether they are “specific to Potomac Edison.” *See, e.g.*, Potomac Edison’s response to OPC DR 1-36 concerning FirstEnergy’s measures to restore FirstEnergy’s and Potomac Edison’s credit rating to investment grade. In addition, the discovery sought may well provide insight into the Icahn Directors’ interactions with other FE Board members and FE executives. Potomac Edison claimed in its response: “the addition of two members to FirstEnergy’s Board – raising the total number of members from 12 to 14 – will not alter the Board’s power structure in such a way that permits the Icahn Designees to exercise substantial influence.” PE Response at 16. What the Icahn Directors are privy to, and what they are saying and doing as FE Board members does not “exceed[] the scope of this proceeding.”

#### **9. OPC DR 1-23**

This request asks Potomac Edison to:

Please provide all strategic planning or financial planning documents (including proposed asset sales or acquisitions) that relate to FE or PE provided to Icahn Designee Andrew Teno or Icahn Designee Jesse Lynn subsequent to the execution of the Icahn Agreement on March 16, 2021.



Potomac Edison Potomac Edison objects to this request “to the extent that it exceeds the scope of this proceeding as set by the Commission.” It goes on to respond with respect to Potomac Edison:

There are no strategic planning or financial planning documents (including proposed asset sales or acquisitions) that relate to Potomac Edison provided to Icahn Designee Andrew Teno or Icahn Designee Jesse Lynn subsequent to the execution of the Icahn Agreement on March 16, 2021.

This response is inadequate. The discovery sought is centrally relevant to Order, ¶ 18 item c. and whether the Icahn Directors can exercise substantial influence over Potomac Edison. Among other things, the information sought will identify the issues that come before the FE Board, its committees, and the Icahn Directors, and demonstrate that those issues are material to the well-being and operation of Potomac Edison, regardless of whether they are “specific to Potomac Edison.” *See, e.g.*, Potomac Edison’s response to OPC DR 1-36 concerning First Energy’s measures to restore First Energy’s and Potomac Edison’s credit rating to investment grade. In addition, the discovery sought, in connection with other discovery (*see, e.g.*, OPC DR 1-22) may well provide insight into the Icahn Directors’ interactions with other FE Board members and FE executives. What the Icahn Directors are privy to, and what they are saying and doing as FE Board members does not “exceed[] the scope of this proceeding.”

#### **10. OPC DR 1-24**

This request asks Potomac Edison to “provide copies of all reports, including audits, whether conducted by or for FE or PE (or any other FE operating company) that addresses, concerns, or relates to “bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy.” Order No. 89888 at P 18(b).

Potomac Edison’s objection on grounds of relevance is specious, if not in bad faith. The discovery sought is plainly and centrally relevant. Potomac Edison’s cross-referenced responses to OPC DRs 1-01, 1-04, and 1-37 is inadequate. For example, Potomac Edison has not provided any meaningful explanation as to how it arrived at the figures it did produce. Potomac Edison also has refused to produce discovery concerning the FirstEnergy internal investigation that it affirmatively chose to put at issue in this proceeding. See Potomac Edison response to OPC DR 1-02. OPC is entitled to the information requested to assess whether Potomac Edison’s ratepayers have only contributed some \$38,000 towards the “bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy.” Order No. 89888 at P 18(b).”

#### **11. OPC DR 1-25**

This request asks Potomac Edison, “[a]long with legal fees, what ‘other costs’ have been incurred in connection with the ‘misconduct by FirstEnergy.’” Potomac Edison “objects to this request to the extent that it exceeds the scope of this proceeding” before asserting that costs were

incurred and charged to FirstEnergy alone. Potomac Edison's objection is unavailing. Order No. 89888 permits OPC to seek discovery concerning "any other costs" associated with the misconduct of FirstEnergy. Order No. 89888 at P 18(b). OPC is entitled to the information requested and to assess whether Potomac Edison's ratepayers have only contributed some \$38,000 towards the "bribes, lobbying costs, legal fees *or any other costs.*" Order No. 89888 at P 18(b).

Further, Potomac Edison's assertion here contradicts its admission in response to OPC DR 1-33 that FirstEnergy's misconduct has resulted in increased borrowing costs for Potomac Edison. If Potomac Edison perceives there is a dividing line between the "other costs" that are subject to discovery and those that are not, then Potomac Edison must substantiate its implicit claim concerning what kinds of "other costs" it would deem to be within the scope of discovery.

#### **12. OPC DR 1-26**

This request asks Potomac Edison to "provide an itemized statement of all legal fees (and related expenses) associated with FirstEnergy's 'misconduct.'" Potomac Edison objects to this request "to the extent that it exceeds the scope of this proceeding." Potomac Edison's objection is unavailing. Order No. 89888 permits OPC to seek discovery concerning "legal fees or any other costs" associated with the misconduct of FirstEnergy. Order No. 89888 at P 18(b). OPC is entitled to assess whether Potomac Edison's ratepayers have contributed any amount of money toward the "legal fees and other costs" associated with FirstEnergy's misconduct, and Potomac Edison is obligated to provide information needed to make that assessment.

#### **13. OPC DR 1-27**

This request asks Potomac Edison to provide the documents that support Potomac Edison's Claim in its Response to OPC's Petition (at 9) that: "Potomac Edison fully expects to have adequate capital to execute its strategic plans." Potomac Edison "objects to this request because it is outside the scope of this proceeding as set by the Commission." That objection is unavailing. The discovery sought is relevant to the matters set for investigation, including: the impact on Potomac Edison's ratepayers of FirstEnergy's costs of borrowing as reflected in its money pool charges, the substantial influence inquiry with regards to the information provided to Icahn Directors, and the extent to which the two bribery scandals have impacted and are expected to impact FirstEnergy's access to and cost of capital.

#### **14. OPC DR 1-28**

This request asks Potomac Edison to provide the "current finance plan," as referenced in Potomac Edison's Response at 8. Potomac Edison objects to this request "because it is outside the scope of this proceeding." But that objection is unavailing. The discovery sought is relevant to the matters set for investigation, including the impact on Potomac Edison's ratepayers of FirstEnergy's future borrowing costs as may be reflected in its money pool charges, and the

extent to which the two bribery scandals have and are expected to impact FirstEnergy's access to and cost of capital.

**15. OPC DR 1-29**

This request asks Potomac Edison to "explain the extent to which PE's "current finance plan" (PE Response at 8) depends on continued access to the FE "money pool." Contrary to Potomac Edison's objection, this request is relevant to the scope of the proceeding. *See* Order, ¶ 18, item a. (permitting discovery concerning "[t]he extent that any results of the scandal have affected, or might in the future affect, Potomac Edison's cost to access funds from FirstEnergy's "money pool").

**16. OPC DR 1-39**

This request (with certain subparts) asks Potomac Edison "[w]ith respect to the [Deferred Prosecution Agreement] [to] please state whether FE intends to hold PE ratepayers harmless for the costs (including legal costs) associated with implementing the Corporate Compliance Program (Att. B) and associated Reporting obligations (Att. C)." Potomac Edison objects on grounds of relevance and contends the request is vague, ambiguous and overbroad.

These objections are unavailing. The Order initiating this proceeding broadly permits discovery into "[w]hether and to what extent FirstEnergy used, is using, or intends to use any funds from Potomac Edison to pay for the bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy." Order, ¶ 18, item b. The costs associated with the Corporate Compliance Program are plainly costs associated with FirstEnergy's misconduct. The Corporate Compliance Program has a defined scope. FirstEnergy is required to track those costs for accounting and regulatory purposes. OPC is entitled to the discovery requested.

\*\*\*\*\*

It is my hope that we will be able to resolve these outstanding discovery issues without resort to motions practice. In that regard, I would ask that Potomac Edison supplement its responses as requested herein by close of business on Friday, September 17, 2021.

If you believe that a phone call would be helpful to reaching an acceptable resolution of these issues, I welcome you to contact me to arrange same.

Thank you for your anticipated cooperation.

Sincerely,

/electronic signature/  
Joseph G. Cleaver  
Deputy People's Counsel

# ATTACHMENT D



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## CN 9667 - Revised Data Requests from Set 1 Following 10/1 Call

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**Irene Wiggins -OPC-** <irene.wiggins@maryland.gov>  
To: jtrout2@firstenergycorp.com  
Cc: jcurran@venable.com, Joseph Cleaver -OPC- <joseph.cleaver@maryland.gov>

Wed, Oct 6, 2021 at 3:24 PM

Dear Jeff,

During our conversation on Friday, you indicated that you may be able to propose, subject to your client's approval, potential compromises for certain of the data requests discussed in OPC's September 10, 2021 letter to Max Curran requesting discovery supplementation. You stated that Potomac Edison may be willing to submit more information provided we narrow certain requests. Below are our proposals for potential compromises of the disputes surrounding three data requests: 1-02, 1-22, and 1-24. With the discovery period ending in less than two months, time is of the essence. As such, OPC's willingness to narrow those three requests in compromise, as set forth below, is contingent upon (i) you letting us know by COB on Monday, October 11 whether PE is willing to provide such information, and (ii) the provision of the information no later than Friday, October 15.

1.02. and 1.24: Where OPC requests reports (including audits), descriptions, notes, or documents, we are willing to narrow the request to portions of those documents that mention or implicate Potomac Edison, Maryland, or any other group in general that would include Potomac Edison or Maryland even if not explicitly mentioned by name (e.g., FirstEnergy's distribution utilities).

1.22: We agree to narrow the request as follows: Please provide all FE Board or FE Board committee notes, agendas, and presentations or reports to the FE Board or FE Board committee subsequent to the execution of the Icahn Agreement on March 16, 2021 that reference or discuss any of the following: the roles or actions of the Icahn designees, the Icahn Agreement, Potomac Edison, or Maryland.

Separately, with respect to OPC DR 1.39 you stated that you would take our explanatory comments under consideration. With the benefit of that consideration, please confirm whether Potomac Edison will be able to provide an answer to this request.

Thank you,

--

Niki Wiggins  
Assistant People's Counsel  
Maryland Office of People's Counsel  
6 Saint Paul Street, Suite 2102  
Baltimore, MD 21202  
410-767-8152  
[irene.wiggins@maryland.gov](mailto:irene.wiggins@maryland.gov)

# ATTACHMENT E



## CN 9667 - Follow-Up to Friday Call

1 message

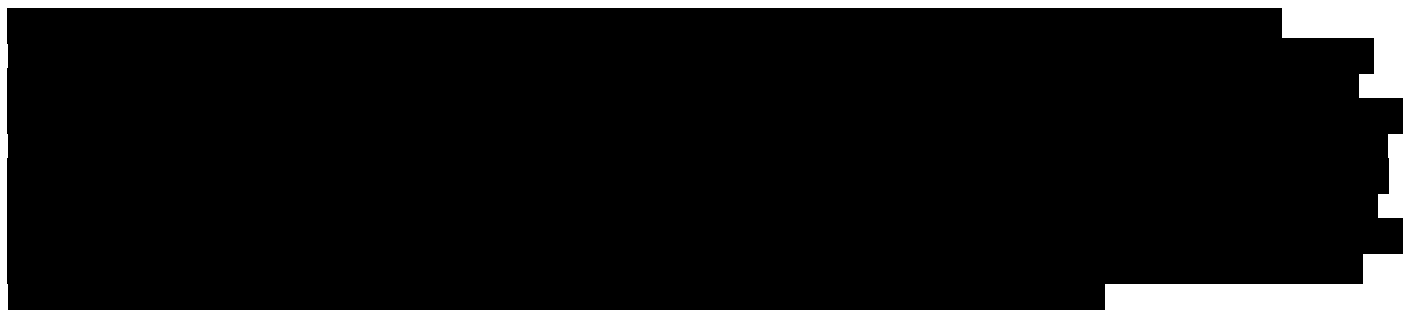
**Joseph Cleaver -OPC-** <joseph.cleaver@maryland.gov>  
To: "Curran, Max" <jcurran@venable.com>, Jeffrey Trout <jtrout2@firstenergycorp.com>  
Cc: Irene Wiggins -OPC- <irene.wiggins@maryland.gov>

Tue, Oct 5, 2021 at 7:07 PM

Max and Jeff,

It was good speaking to you both on Friday. I write to follow-up on our conversation. As I mentioned, there are two additional data requests for which we seek supplementation:

**OPC 1-01:** This request seeks discovery concerning PE's assertion that it "has identified less than \$38,000 of such improperly classified or inadequately documented funds that were inadvertently reflected in distribution base rates as a result of the last base rate case." PE's response to this request is inadequate--particularly its response to subparts b. and c., which seek supporting documents and an explanation of why \$38,000 in charges was "improperly classified or inadequately documented."



**OPC 1-40:** The DR asks for "a complete accounting of all internal personnel costs and all outside legal and consulting costs incurred by FE or its subsidiary utilities in responding to (including internal investigations of) the HB6 scandal and Ohio consultancy scandal subsequent to the issuance of the federal Householder indictment on July 21, 2020 and FE's November 19, 2020, SEC Form 10-Q report of the improper consultancy payments. Provide all supporting documents."

With this request, we are asking for a complete accounting of all internal personnel costs and all outside legal and consulting costs incurred by FE or its subsidiary utilities in responding to (including internal investigations of) the HB6 scandal and Ohio consultancy scandal subsequent to the issuance of the federal Householder indictment on July 21, 2020 and FE's November 19, 2020, SEC Form 10-Q report of the improper consultancy payments. We need to know what costs were incurred in order to assure ourselves and the Commission that none of this is in the PE rates now, or will be included in a later rate case.

Kindly advise whether PE will supplement these responses to provide the requested information.

Joe

--  
Joseph G. Cleaver, Esq.  
Deputy People's Counsel  
Maryland Office of People's Counsel  
[6 St. Paul Street, Suite 2102](http://www.opc.state.md.us)  
[Baltimore, MD 21202](http://www.opc.state.md.us)  
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