

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of The Ohio Edison)
Company, The Cleveland Electric Illuminating) Case No. 17-974-EL-UNC
Company, and The Toledo Edison Company's)
Compliance with R.C. 4928.17 and the Ohio)
Adm. Code Chapter 4901:1-37.)

**APPLICATION FOR REHEARING RELATED TO FIRSTENERGY'S HOUSE
BILL 6 ACTIVITIES AND OTHER MATTERS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC") files this Application for Rehearing to seek consumer protections that the PUCO did not order, in its November 4th Entry responding to OCC's September 8th Motions regarding the House Bill 6 scandal. This Application is filed with the backdrop of FirstEnergy's alleged activities as described in a federal Criminal Complaint against former Ohio House Speaker Householder and certain others involved in House Bill 6.¹ Since OCC's original filing, FirstEnergy Corp. fired its most senior executives including CEO Chuck Jones, two of the indicted individuals pleaded guilty to crimes, and the PUCO Chair resigned.

Standard & Poor's recently wrote that: "We believe these violations at the highest level of the company are demonstrative of insufficient internal controls and a cultural weakness. We view the severity of these violations as significantly outside of industry

¹ FirstEnergy has not to date been charged with a crime.

norms and, in our view, they represent a material deficiency in the company's governance."²

In light of the House Bill 6 scandal, OCC asked the Public Utilities Commission of Ohio ("PUCO") to, among other things, conduct an independent management audit and investigation of FirstEnergy to address matters including whether its activities related to House Bill 6 violated Ohio's corporate separation law³, state policy prohibiting subsidies of utility affiliates by utility customers⁴ and PUCO rulings.⁵ OCC asked the PUCO to protect Ohio consumers through, among other things, an investigation of the source of FirstEnergy Corp.'s money used for political purposes so as to ascertain if the money came from consumers' pockets through rates they pay for electric utility service.

Instead of granting OCC's motions, the PUCO ordered something else – an "additional corporate separation audit." The PUCO then issued a request for proposal ("RFP") that sets the scope of the additional audit. Interestingly, the RFP lacks an express reference to House Bill 6 and for the most part was a copy of a pre-House Bill 6 RFP that the PUCO issued on May 17, 2017, other than having a relevant timeline etc.

The PUCO's limited response to OCC's motions does not correlate with the severity of the situation for FirstEnergy's involvement in the scandal of tainted House

² Khalid, U., "S&P downgrades FirstEnergy following \$1.95B draw on revolving credit facility," Market Intelligence (Nov. 25, 2020). <https://platform.marketintelligence.spglobal.com/web/client?auth=inherit#news/article?Id=61442506&KeyProductLinkType=2>

³ R.C. 4928.17 (prohibits utility from extending undue preference or advantage to any affiliate).

⁴ R.C. 4928.02(H) (prohibits subsidies of competitive generation through distribution rates).

⁵ See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at ¶282 (Oct. 12, 2016) (ordering its Staff to review how the Companies and FirstEnergy Corp. use the distribution modernization rider funds to ensure, among other things, that "there is no unlawful subsidy of the Companies' affiliates.")

Bill 6 and its issues with corporate governance. But it should. Otherwise, the PUCO may merely go through the motions without ever getting close to the truth that is needed for a corporation that bears the high responsibility of serving about half the electric consumers (two million) in the state.

Per R.C. 4903.10, OCC seeks rehearing of the PUCO's November 4, 2020 Entry, as being unreasonable and unlawful in the following respects:

1. The PUCO erred by failing to order FirstEnergy to produce to the PUCO and parties all documents pertaining to investigations that are underway concerning FirstEnergy's House Bill 6 activities, including the internal investigation by the FirstEnergy Corp. Independent Board of Directors, which apparently resulted in the termination of FirstEnergy Corp. executives⁶ including its CEO and led to the resignation of the PUCO Chair.⁷
2. The PUCO erred by failing to establish an *independent audit committee* (which in variation the PUCO has used in the past⁸) to oversee its ordered audit of any House Bill 6-related spending by FirstEnergy and its affiliates. The purpose of the audit committee and its structure should be, among other things, to provide independent guidance for the audit process (separate from the PUCO). This is appropriate in the context of but not limited to the circumstance of the former PUCO Chair's potential relationship with FirstEnergy as (obscurely) alluded to in the S.E.C. Form 10-Q that FirstEnergy filed on November 19, 2020.

⁶ J. Smyth and M. Gillispie, "FirstEnergy: Ohio regulator's firm got \$4m consulting fee," Assoc. Press (Nov. 19, 2020). <https://apnews.com/article/ohio-columbus-utilities-mike-dewine-9af2b3464cd053045378037d7b8ab063>

⁷ See https://content.govdelivery.com/attachments/OHOOD/2020/11/20/file_attachments/1607093/Resignation.pdf

⁸ *In the Matter of the Investigation into the Gas Purchasing Practices and Policies of Columbia Gas of Ohio*, Case No. 83-135-GA-COI.

3. The PUCO erred by, respectively, issuing its ruling and then not vacating and revisiting its ruling on the OCC's motions and related issues, in the context of but not limited to the circumstance of the former PUCO Chair's potential relationship with FirstEnergy as (obscurely) alluded to in the S.E.C. Form 10-Q that FirstEnergy filed on November 19, 2020.
4. The PUCO erred by stating and acting on unjustified concerns about alleged limits on its jurisdiction over FirstEnergy Corp. and its affiliates for purposes of investigations etc., despite there being ample statutory authority for its purposes.⁹
5. The PUCO erred by not initiating a complaint or investigation under R.C. 4928.18 and 4905.26 that includes a full independent management audit and investigation as requested by OCC, including an investigation of the use of distribution modernization charge funds, instead of merely initiating the corporate separation audit.
6. The PUCO erred by setting an audit scope for the "additional corporate separation audit" that for consumer protection should more broadly address corporate separation issues. The PUCO should expand the scope of the corporate separation audit after initiating a complaint or investigation under R.C. 4905.26 and 4928.18.

The reasons in support of this Application for Rehearing are more fully set forth in the accompanying Memorandum in Support. The PUCO should protect FirstEnergy's consumers by granting rehearing and abrogating or modifying its Entry as proposed by OCC.

⁹ *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17*, Case No. 17-974-EL-UNC, Entry at par. 17 (Nov. 4, 2020) (PUCO stating its intent to act "with due consideration to the limits on our statutory authority over FirstEnergy Corp. and over the political and charitable activity of all public utilities in this state.")

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING
RELATED TO FIRSTENERGY'S HOUSE BILL 6 ACTIVITIES AND OTHER
MATTERS**

I. INTRODUCTION

Three months ago OCC filed motions asking the PUCO to investigate any violations of utility regulatory principles and practices by FirstEnergy Corp. and FirstEnergy Utilities associated with the passage of tainted House Bill 6 and the ensuing House Bill 6 scandal.¹⁰ But the PUCO's later response—calling for an additional corporate separation audit with a severely limited scope -- falls short of consumer protection in light of the House Bill 6 scandal.

Standard & Poor's recently wrote that: "We believe these violations at the highest level of the company are demonstrative of insufficient internal controls and a cultural weakness. We view the severity of these violations as significantly outside of industry

¹⁰ *In the Matter of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37; In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*; Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, OCC Motion for PUCO Investigation and Management Audit (Sept. 8, 2020).

norms and, in our view, they represent a material deficiency in the company's governance."¹¹

Also, the PUCO appears to be limiting its jurisdiction even before an auditor is chosen for the corporate separation audit. And the limited scope of the audit will not determine if consumers funded the alleged illegal House Bill 6 activities through the money they paid to FirstEnergy utilities. All that should change.

II. MATTERS FOR CONSIDERATION

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by failing to order FirstEnergy to produce to the PUCO and parties all documents pertaining to investigations that are underway concerning FirstEnergy's House Bill 6 activities, including the internal investigation by the FirstEnergy Corp. Independent Board of Directors, which apparently resulted in the termination of FirstEnergy Corp. executives¹² including its CEO and led to the resignation of the PUCO Chair.¹³

The PUCO's review of FirstEnergy's House Bill 6 spending is just beginning. Other investigations (including by FirstEnergy's Board and the Securities and Exchange Commission) have been underway for a while or, in the instance of the federal Criminal Complaint, for even longer. And the New Jersey Board of Public Utilities recently ordered a public hearing related to credit downgrades to FirstEnergy made by rating agencies related to these recent events in Ohio.¹⁴ These other investigations can provide

¹¹ Khalid, U., "S&P downgrades FirstEnergy following \$1.95B draw on revolving credit facility," Market Intelligence (Nov. 25, 2020). <https://platform.marketintelligence.spglobal.com/web/client?auth=inherit#news/article?Id=61442506&KeyProductLinkType=2>

¹² J. Smyth and M. Gillispie, "FirstEnergy: Ohio regulator's firm got \$4m consulting fee," Assoc. Press (Nov. 19, 2020). <https://apnews.com/article/ohio-columbus-utilities-mike-dewine-9af2b3464cd053045378037d7b8ab063>

¹³ See https://content.govdelivery.com/attachments/OHOOD/2020/11/20/file_attachments/1607093/Resignation.pdf

¹⁴ *In the Matter of the Provision of Basic Generation Service Pursuant to the Electric Discount and Energy Competition Act*, Docket No. EF20110702, Notice of Public Hearing (Nov. 25, 2020).

important information for the PUCO and parties to consider. FirstEnergy Corp.'s internal investigation by its Board has already resulted in dramatic leadership changes there.

The FirstEnergy Board's internal investigation apparently indicates violations of corporate governance standards or other issues by the fired executives. The PUCO should be keenly interested in corporate governance issues where franchised utilities that serve millions of Ohioans are involved. And other investigations may have even more information that can provide answers about whether customers' funds were misused on House Bill 6 activities.

The PUCO should be obtaining as much information as possible for assurance that customers are being properly served and for making any changes to provide for that assurance. It should have ordered such information to be produced, to the extent available. Rehearing should be granted and the Entry abrogated.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by failing to establish an *independent audit committee* (which in variation the PUCO has used in the past¹⁵) to oversee its ordered audit of any House Bill 6-related spending by FirstEnergy and its affiliates. The purpose of the audit committee and its structure should be, among other things, to provide independent guidance for the audit process (separate from the PUCO). This is appropriate in the context of but not limited to the circumstance of the former PUCO Chair's potential relationship with FirstEnergy as (obscurely) alluded to in the S.E.C. Form 10-Q that FirstEnergy filed on November 19, 2020.

To promote independence, transparency and public confidence in the audit process, the PUCO should have established an Independent Audit Committee or Special Council to play a significant role in overseeing the audit. The Independent Audit Committee (or Special Council) should have been appointed for guidance in choosing the auditor (and to be materially involved in that), for participation in oversight of the audit

¹⁵ *In the Matter of the Investigation into the Gas Purchasing Practices and Policies of Columbia Gas of Ohio*, Case No. 83-135-GA-COI.

(and to be materially involved in that), and to provide guidance for governing the process from start to finish (and to be materially involved in that). This approach is especially important given that the House Bill 6 scandal has now touched the PUCO Chair's office. Use of an Independent Audit Committee may be especially needed for the public's trust and confidence at this time when issues of public corruption are rampant.

The PUCO has successfully used a public process with a separate authority structure in the past. For instance, when Columbia Gas of Ohio was ordered to undergo an audit of its purchasing practices (after the PUCO found a "lack of diligence in seeking out Ohio produced gas"),¹⁶ the PUCO appointed a ten-member public advisory committee "to enhance the audit process and provide meaningful participation."¹⁷ Ultimately and dramatically, the PUCO ordered changes in Columbia's Board.¹⁸

To promote transparency and public confidence in the audit process, the PUCO should establish an Independent Audit Committee (Special Council) to oversee the audit process. The PUCO should grant rehearing on this issue.

¹⁶ *In the Matter of the Investigation Into the Gas Purchasing Practices and Policies of Columbia Gas of Ohio, Inc.*, Case No. 83-135-GA-COI, Entry (Jan. 26, 1983).

¹⁷ *See id.*, Opinion and Order at 21, 24 (Oct. 8, 1985) and describing the Public Advisory Committee as a novel idea for Commission proceedings that "served a very necessary and beneficial function."

¹⁸ *Id.* at 16 (ordering an independent board of directors with the majority of the directors living or working in the utility's service territory, and not being employees or associated with the utility).

ASSIGNMENT OF ERROR NO. 3: The PUCO erred by, respectively, issuing its ruling and then not vacating and revisiting its ruling on the OCC's motions and related issues, in the context of but not limited to the circumstance of the former PUCO Chair's potential relationship with FirstEnergy as (obscurely) alluded to in the S.E.C. Form 10-Q that FirstEnergy filed on November 19, 2020.

Three months ago OCC filed motions asking the PUCO to investigate any violations of utility regulatory principles and practices by FirstEnergy Corp. and FirstEnergy Utilities associated with the passage of tainted House Bill 6 and the ensuing House Bill 6 scandal.¹⁹ In a September 15th Attorney Examiner Entry, the PUCO responded to OCC's consumer protection motions – by mostly not granting them. Attorney Examiner Price merely directed the three FirstEnergy Ohio utilities “to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum efforts, were not included, directly or indirectly, in any rates or charges paid by ratepayers in the state.”²⁰ OCC (through an interlocutory appeal) sought a review of Examiner Price's Entry on grounds that the PUCO's limited review and reliance on self-reporting by FirstEnergy was inadequate for consumer protection. (OCC's interlocutory appeal has not been ruled upon.)

More recent developments now provide even more justification and support for a full independent investigation and audit into FirstEnergy's House Bill 6 activities as OCC

¹⁹ *In the Matter of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37; In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*; Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, OCC Motion for PUCO Investigation and Management Audit (Sept. 8, 2020).

²⁰ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Entry at par. 5 (Sept. 15, 2020).

had called for in its September motions. These events include the firing of FirstEnergy Corp. executives for violating FirstEnergy policies and its code of conduct (reported October 29, 2020). While the PUCO did subsequently recognize that it needed to take additional action in response to FirstEnergy Corp.'s October 29 SEC filing,²¹ its response (the November 4, 2020 Entry that is the subject of this rehearing request) falls far short of consumer protection needed in light of the House Bill 6 scandal.

Also, the PUCO's November 4 response preceded the resignation of the PUCO Chair (on Nov. 20, 2020) related to FirstEnergy's SEC filing. That filing reported a \$4 million payment made in early 2019 to an "entity associated with an individual who subsequently was appointed to a full-time role as an Ohio Government official directly involved in regulating the Ohio companies, including with respect to distribution rates.")²²

The recent circumstances involving the former PUCO Chair's departure from the PUCO have created the need for additional scrutiny over FirstEnergy's House Bill 6 activities and its conduct of business in Ohio before the PUCO. The former PUCO Chair did not formally sign either of the PUCO's rulings concerning OCC's requests for investigation and review of these matters. But PUCO personnel over whom a PUCO chair has authority would nevertheless be likely involved in such matters.

Given FirstEnergy Corp.'s firings of its top executives and the apparent underlying reasons for doing so, and the resignation of the former PUCO Chair, the

²¹ *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at par. 17 (Nov. 4, 2020).

²² FirstEnergy 10Q filing at 36 (November 19, 2020).

PUCO should have vacated and revisited its ruling, and then ordered an expanded and deeper audit, on the OCC's motions and related issues. The PUCO has the authority²³ to revisit its decisions based on its authority under R.C. 4905.26 and Ohio Civil Rule 60(B). *See, e.g., In re: Complaint of the City of Cincinnati v. Cincinnati Gas & Electric Co. et al.*, 91-377, 1991 WL 11811022 (June 27, 1991). At a minimum the PUCO should revisit its rulings now and order an expanded and deeper audit for consumer protection.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by stating and acting on unjustified concerns about alleged limits on its jurisdiction over FirstEnergy Corp. and its affiliates for purposes of investigations etc., despite there being ample statutory authority for its purposes.²⁴

The PUCO has broad jurisdiction, under R.C. 4928.17 and Ohio Adm. Code 4901:1-37, to audit whether FirstEnergy Utilities violated, among other things, its PUCO-approved corporate separation plan.²⁵ That would include whether the Utilities used captive customer charges for regulated electric utility service to fund directly or indirectly FirstEnergy Corp.'s unregulated political and charitable activities, that have been referenced in criminal proceedings involving others, regarding House Bill 6.

Under R.C. 4928.17, a utility must submit a corporate separation plan for PUCO approval. That plan must satisfy "the public interest in preventing unfair competitive

²³ Also see generally, ELPC Motion to Vacate and Conduct New Proceedings filed in *In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for an Extension of the Distribution Modernization Rider*, Case No. 19-361-EL-RDR (Nov. 24, 2020).

²⁴ *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17*, Case No. 17-974-EL-UNC, Entry at par. 17 (Nov. 4, 2020) (PUCO stating its intent to act "with due consideration to the limits on our statutory authority over FirstEnergy Corp. and over the political and charitable activity of all public utilities in this state.")

²⁵ *See also* the PUCO's broad jurisdiction under R.C. 4905.05, 4905.06, and 4909.54 to conduct an audit and examine whether FirstEnergy Utilities violated Ohio laws by using charges for regulated utility service to subsidize unregulated political and charitable spending.

advantage and preventing the abuse of market power,” per R.C. 4928.17(A)(2). And it must be “sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service,” per R.C. 4928.17(A)(3). Ohio law also establishes state policy to protect competition by avoiding subsidies between and among competitive and non-competitive retail electric services, in R.C. 4928.02(H).

If affiliates of FirstEnergy Utilities used funds from monopoly customers to subsidize House Bill 6 activities that benefitted FirstEnergy Solutions, then Ohio laws and PUCO rules would be violated. In this case, political and charitable spending regarding House Bill 6, if funded directly or indirectly through FirstEnergy Utilities’ charges to utility consumers, would provide an unfair advantage to FirstEnergy Corp. and FirstEnergy Utilities’ affiliates. That is not lawful under Ohio law and PUCO rules.

The PUCO has ample authority to examine whether such corporate separation violations occurred. It should exercise its authority. The audit the PUCO ordered to date is insufficient.

Under R.C. 4928.18, so long as there is a filed complaint (R.C. 4905.26), the PUCO is given express authority to determine “whether an electric utility or its affiliate has violated any provision of section 4928.17 of the Revised Code or any order issued or rule adopted under that section.” That statute further grants the PUCO authority to “examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the business for which corporate separation is required.”

This authority extends to utility affiliates even beyond the borders of Ohio: “We believe that the Commission and Staff should be provided with full knowledge of a

utility's interaction with all of its affiliates, not just those doing business in Ohio.” *In the Matter of the Review of Ohio Adm. Code Chapter 4901:1-36, Electric Transmission Cost Recovery Riders; In the Matter of the Review of Ohio Adm.Code Chapter 4901:1-37, Corporate Separation for Electric Utilities and Affiliates, et al.*, Case No. 13-953-EL-ORD et al., Finding and Order at ¶31 (Sept. 10, 2014) (declining to adopt modifications to corporate separation rules that would not require utilities to provide information on affiliates outside of Ohio).

Additionally, under R.C. 4928.18, the PUCO “may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations.” The PUCO has recognized the importance of these powers: “The Commission staff needs access to the books and records of all affiliates regardless of whether they have transactions with the electric utility or not. Such access is permitted under Section 4928.18, Revised Code, and is necessary in order to determine, for example, whether revenues from captive ratepayers [customers] are being used to subsidize unregulated businesses.” *In the Matter of the Commission’s Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*, Case No. 88-1141-EL-ORD, Finding and Order at 62-63 (Nov. 30, 1999).

The PUCO has acknowledged that this statute gives it jurisdiction to review allegations that non-regulated activities are being subsidized with monopoly customer revenues and assets, with possible effects on regulated services. *See, e.g., In the Matter of the Complaint of National Electrical Contractors’ Association, Ohio Conference et al. v. Ohio Edison, Toledo Edison, Cleveland Electric Illuminating Company and FE Corp.*,

Case No. 98-1400-EL-CSS Entry at ¶7 (Jan. 28, 1999) (finding it has jurisdiction over the allegations in a complaint because the allegations involved unregulated competitive activities which were allegedly subsidized with monopoly revenues and/or assets); *Westside Cellular, Inc. d.b.a. Cellnet v. GTE Mobilnet Inc. et al.* Case No. 93-1758-TP-CSS, Entry (Mar. 23, 1995) (PUCO had jurisdiction over complaint alleging cross-subsidizing retail operations with profits generated by wholesale operations).

All the PUCO needed to do was to initiate a complaint under R.C. 4905.26 to get the ball rolling for proper PUCO oversight. In a full and complete Commission-ordered Investigation, conducted under R.C. 4928.18 and 4905.26, the PUCO has express authority to determine if an electric utility or its affiliates violated the anti-subsidy provision of R.C. 4928.17.²⁶ And the PUCO could overcome what it said are “the limits on [its] statutory authority over FirstEnergy Corp. and over the political and charitable activity of all public utilities in this state.”²⁷ The PUCO erred. Rehearing should be granted.

²⁶ See *In the Matter of the Application of Duke Energy Retail Sales, LLC, for Certification as a Competitive Retail Electric Service Provider in Ohio*, Case No. 04-1323-EL-CRS, Entry at 11-12 (Dec. 3, 2008), (where the PUCO acknowledged its authority under R.C. 4928.18 and 4905.26 to determine whether an electric utility or its affiliate has violated any provision of R.C. 4928.17 or an order issued or rule adopted under that section, and noted the broad range of remedies available under R.C. 4928.18 to address violations).

²⁷ *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company’s Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶17 (Nov. 4, 2020).

ASSIGNMENT OF ERROR 5: The PUCO erred by not initiating a complaint or investigation under R.C. 4928.18 and 4905.26 that includes a full independent management audit and investigation as requested by OCC, including an investigation of the use of distribution modernization charge funds, instead of merely initiating the corporate separation audit.

ASSIGNMENT OF ERROR 6: The PUCO erred by setting an audit scope for the “additional corporate separation audit” that for consumer protection should more broadly address corporate separation issues. The PUCO should expand the scope of the corporate separation audit after initiating a complaint or investigation under R.C. 4905.26 and 4928.18.

Instead of asserting jurisdiction through a commission-initiated investigation, the PUCO ordered an “additional corporate separation audit.” Such an audit is focused on whether a utility’s corporate separation plan is sufficient under PUCO rules and meets Ohio law. Back in 2014, the PUCO set up corporate separation audits for each of Ohio’s electric distribution utilities to ensure their compliance with R.C. 4928.17 and the PUCO’s corporate separation rules.²⁸ At the time, audits were ordered in lieu of requiring full divestiture and separate shareholders. Case No. 17-974 (where the additional audit will take place) was the first audit of any utility’s corporate separation plan.

Corporate separation between electric monopolies and their unregulated affiliates is intended to provide protection for captive monopoly customers against (among other things) subsidizing utility affiliates. Corporate separation is a good thing for the PUCO to audit, but this audit will not produce the information that will provide a definitive answer that consumers are seeking: Did FirstEnergy use funds collected from them (FirstEnergy’s utility customers) for House Bill 6 activities that benefitted FirstEnergy affiliates, including FirstEnergy Solutions?

²⁸ *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at ¶16 (Mar. 26, 2014).

In its Entry the PUCO set up an additional corporate separation audit to review activity between Nov. 1, 2016 through Oct. 31, 2020. Nowhere in the Request for Proposal (“RFP”) is House Bill 6 mentioned, although the timeline for the audit would cover House Bill 6 activities. The PUCO appears to be focused on having the auditor review “transactions subject to the Companies’ cost allocation manual.” In other words, the auditor will be focusing on *costs* that were charged to customers, and not on whether *revenues* collected from customers were used to fund House Bill 6 activities. The PUCO’s approach to auditing is self-limiting and, by its own terms, will not produce an answer for consumers to the questions that should be asked and answered about FirstEnergy’s sources and uses of money related to the House Bill 6 scandal.

To be clear, *an investigation and audit*, as OCC requested, should have been ordered to determine whether FirstEnergy Utilities extended an undue preference to FirstEnergy Solutions or other affiliates in violation of Ohio law (4928.17; 4928.02(H)). The only way to determine if FirstEnergy Utilities customers have been subsidizing House Bill 6 activities to the benefit of FirstEnergy affiliates is to trace the funds collected from monopoly utility customers to their ultimate use. The PUCO however has not required the Auditor to trace the funds as part of the audit.

In conjunction with a full investigation of FirstEnergy’s House Bill 6 activities as they relate to the use of customer funds, the PUCO should also order an audit with a scope of activities which will provide answers for consumer protection. The audit must necessarily trace the funds collected from customers to their ultimate use.

In particular, the auditor should be auditing the use of the distribution modernization funds collected from customers to learn if that money was used to fund

House Bill 6 activities. By prior PUCO Order, these funds were not to be used to subsidize FirstEnergy affiliate activities.²⁹ The scope of the audit should include not just “transactions subject to the cost allocation manual” but should extend to House Bill 6 activities by FirstEnergy affiliates where money collected from the FirstEnergy Utilities was used for the benefit of FirstEnergy affiliates.

The auditor should also review whether the accounting utilized by FirstEnergy Corp. facilitated the use of regulated customer funds on affiliate activities in violation of Ohio regulatory law and policy. The policies and code of conduct that allegedly were violated by the three FirstEnergy executives (and maybe more) who were terminated should also be examined by the auditor.

OCC recommends the scope of the audit be rewritten to include the following:

- A review of whether funds collected from consumers were used to fund House Bill 6 activities in violation of Ohio corporate separation law (R.C. 4928.17), Ohio policy against subsidies (R.C. 4928.02(H)), or PUCO Orders (Case No. 14-1297-EL-SSO).
- A review of and tracing for any money collected from consumers, including but not limited to distribution modernization charge money, that may have been used to subsidize affiliate activities in connection with House Bill 6 instead of for electric utility service.
- A review of the corporate structure of FirstEnergy Corp, including all its affiliates and subsidiaries to examine the opportunities for funding (through revenue or expense sharing) House Bill 6 activities.
- An examination of and tracing of all funding for House Bill 6 activities including all transactions for the time-period identified in the RFP but not limited to that time-period, not just transactions subject to the cost allocation manual.

²⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297, Fifth Entry on Rehearing at ¶282 (Oct. 12, 2016); Eighth Entry on Rehearing at ¶123 (Aug. 16, 2017).

- An examination of the deconsolidation of FirstEnergy Solutions financial reporting from FirstEnergy Corp. and whether it affected the ability to audit and trace House Bill 6 funding transactions.
- A review of FirstEnergy Corp.'s policies and code of conduct that were violated by the three FirstEnergy Corp. executives (and any others) who were terminated, as reported in FirstEnergy Corp.'s Form 8k filed with the U.S. Securities and Exchange Commission on October 29, 2020, including a review of the activities by FirstEnergy personnel and allegedly one PUCO employee (the former PUCO Chair) regarding the financial and non-financial issues referenced in the November 19th FirstEnergy Form 10-Q and ramifications and lessons learned from those issues, to whatever extent, in connection with the operations of FirstEnergy and the PUCO, respectively.
- A review and tracing of funding from FirstEnergy utility customers to any FirstEnergy affiliate during the identified period of time.
- A review and identification of all charitable or political organizations that received House Bill 6 funding from any FirstEnergy Corp or FirstEnergy affiliate with tracing of the funding to its origin during the identified period of time.
- A review of all governmental affairs transactions between FirstEnergy Corp. and any FirstEnergy affiliate and any Ohio elected officials or Ohio campaigns during the identified period of time.

Only under a targeted scope for the audit, as discussed here, where the money trail is followed from the collection from customers to the expenditure for utility service or any House Bill 6 activities (as determined by the audit), will FirstEnergy customers get the answers they deserve. *Otherwise, the PUCO may have merely gone through the motions without ever getting close to the truth.* The PUCO should grant rehearing and modify the scope of the audit accordingly.

III. CONCLUSION

The PUCO's approach to auditing is self-limiting and, by its own terms, will not produce an answer for consumers to the questions that should be asked and answered about FirstEnergy's sources and uses of money related to the House Bill 6 scandal and relevant issues beyond those matters. The PUCO should respectfully grant this Application for Rehearing for consumer protection amidst the deepening scandal of House Bill 6.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing has been served via electronic transmission upon the following parties of record this 4th day of December 2020.

/s/ Maureen R. Willis

Maureen R. Willis

Senior Counsel

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Summary: App for Rehearing Application for Rehearing Related to FirstEnergy's House Bill 6 Activities and Other Matters by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.