

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**INTERLOCUTORY APPEAL,  
REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS,  
AND  
APPLICATION FOR REVIEW  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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September 20, 2021

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The Office of the Ohio Consumers' Counsel ("OCC") appeals (to the PUCO Commissioners) a ruling by PUCO Attorney Examiner Price. On September 14, 2021, Examiner Price granted FirstEnergy Corp.'s motion to quash a major part of OCC's subpoena for determining whether consumers have been harmed by the FirstEnergy Utilities related to scandals involving House Bill 6 etc. (FirstEnergy Corp. is the company in the scandal that was recently charged with a federal crime and admitted facts underlying the crime.) The ruling is reflected in the attached excerpts from the transcript of the prehearing conference. Unfortunately for the public, Examiner Price relieved FirstEnergy Corp. of the OCC subpoena's requirement to produce "[a]ll documents related to the internal investigation"<sup>1</sup> that FirstEnergy Corp. is conducting related to H.B. 6. OCC asks that this appeal be certified to the PUCO Commissioners for their review and that they reverse Examiner Price's ruling that granted FirstEnergy's motion, under Ohio Adm. Code 4901-1-15(B) and (E).

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<sup>1</sup> Subpoena Duces Tecum issued to FirstEnergy Corp. (June 25, 2021).

Unlike PUCO Examiner Price's ruling in favor of the FirstEnergy Utilities, a U.S. District Judge has ordered FirstEnergy Corp. to produce for plaintiffs (shareholders) in the securities fraud case copies of all documents that FirstEnergy Corp. produced to the U.S. Attorney, which presumably includes these documents relating to the internal investigation.<sup>2</sup> Ohio consumers deserve no less from their state regulator, the PUCO. For consumer protection, the PUCO should reverse its Examiner Price's ruling and not permit the FirstEnergy Utilities to thwart a thorough and proper PUCO investigation related to whether the FirstEnergy Utilities violated Ohio Corporate Separation Law.

The PUCO opened this case on September 15, 2020 in response to the OCC's September 8, 2020 motions<sup>3</sup> to investigate FirstEnergy.<sup>4</sup> OCC's motions were prompted by a criminal complaint filed by the U.S. Attorney for the Southern District of Ohio alleging bribes and kickbacks to pass tainted House Bill 6 ("H.B. 6").<sup>5</sup>

PUCO Examiner Price's ruling represents a new and novel interpretation of policy and a departure from past precedent. An immediate determination is needed to prevent the likelihood of undue prejudice or expense to OCC and FirstEnergy's consumers, considering that the documents related to the internal investigation would likely produce highly relevant information including information that would be admissible at hearing. At the very least these documents could be used in formulating comments for this proceeding, which are presently due on October 14, 2021.

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<sup>2</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Opinion and Order at 6 (June 14, 2021).

<sup>3</sup> OCC filed its motions in both Case 17-2474-EL-RDR and Case 17-974-EL-UNC (September 8, 2020).

<sup>4</sup> "FirstEnergy" refers to the FirstEnergy utilities, The Cleveland Electric Illuminating Company, Ohio Edison Company and The Toledo Edison Company.

<sup>5</sup> *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes, and Generation Now*, Case No. 1:20-MJ-00526 (U.S. Dist. S.D.) (July 17, 2020).

Accordingly, and for the protection of utility consumers, the PUCO Commissioners should respond to OCC's interlocutory appeal by reversing Examiner Price's ruling of September 14, 2021. The ruling should be expeditiously reversed and FirstEnergy Corp.'s motion to quash the subpoena should be denied, in the public's interest for a proper investigation of FirstEnergy. FirstEnergy should be ordered to produce all of the documents no later than October 6, 2021.

The reasons for granting this interlocutory appeal are more fully stated in the following memorandum in support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

This case was initiated because of OCC's motions to seek consumer protection in connection with what federal prosecutors have called "the largest bribery scheme ever" in Ohio.<sup>6</sup> FirstEnergy Corp. fired its CEO and two other top executives on October 29, 2020. The firings occurred the same day that two of the criminal defendants in the *U.S. v. Householder*<sup>7</sup> entered guilty pleas.<sup>8</sup> FirstEnergy Corp.'s October 29, 2020 SEC filing explained that while a committee of independent members of FirstEnergy's Board of Directors was directing an internal investigation of ongoing governmental investigations, it concluded that the executives' actions related to H.B. 6 had violated company policies and its code of conduct.<sup>9</sup> Later SEC filings revealed that FirstEnergy, through the course of its internal investigation, had discovered a \$4.3 million payment to a firm controlled by the former PUCO Chair and ten years of costs that were misallocated to the FirstEnergy Utilities.<sup>10</sup>

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<sup>6</sup> N. Reimann, Ohio Speaker of the House Arrested in State's 'Largest Bribery Scheme Ever,' Forbes.com (July 21, 2020).

<sup>7</sup> *U.S. v. Larry Householder, et al.*, Case No. 1:20-cr-00077, Complaint (S.D. Ohio) (July 21, 2020).

<sup>8</sup> J. Mackinnon, *FirstEnergy fires CEO Chuck Jones after 2 plead guilty in Householder bribery scheme*, Akron Beacon-Journal (Oct. 29, 2020).

<sup>9</sup> FirstEnergy Corp., Form 8-K (Oct. 29, 2020).

<sup>10</sup> FirstEnergy Corp., Form 10-K (Feb. 18, 2021).

All of these matters appear to be corporate separation violations because FirstEnergy Corp. took these steps to enact a subsidy for its affiliate-owned nuclear plants, but improperly charged the costs to consumers of the FirstEnergy Utilities. The independent audit in the FirstEnergy's Delivery Capital Recovery case confirmed that these payments were charged to the FirstEnergy Utilities.<sup>11</sup> Naturally, the documents related to the internal investigation are highly relevant to the PUCO's H.B. 6-related investigations and would likely lead to admissible evidence in these proceedings.

OCC initially sought these documents from the FirstEnergy Utilities, but the utilities claimed these documents are not within their possession, custody or control.<sup>12</sup> As a result, OCC filed a motion to subpoena these documents from FirstEnergy Corp., and OCC worded the subpoena in the broadest possible terms to request:

All documents related to the internal investigation by a committee of independent members of the FirstEnergy Corp. Board of Directors, including but not limited to, its reported decisions to terminate certain executives for violations of FirstEnergy policies and its code of conduct associated with the "purported consulting agreement" (as reported in FirstEnergy Corp. Form 10-K at 28 (Feb. 18, 2021)).

At the September 14, 2021 prehearing conference, the Attorney Examiner granted FirstEnergy Corp.'s motion to quash the subpoena, except that he required FirstEnergy Corp. to produce for in camera inspection the documents from its internal investigation limited to documents related to firing its CEO and other executives.<sup>13</sup>

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<sup>11</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of FirstEnergy*, Case No. 20-1629-EL-RDR, Compliance Audit of the 2020 Delivery Capital Recovery (DCR) Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company and Expanded Scope (Aug. 3, 2021).

<sup>12</sup> *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, Motion to Compel Responses to Fifth and Seventh Sets of Discovery and Request For Expedited Ruling on Motion to Compel and Motion for In-Camera Hearing by Office of the Ohio Consumers' Counsel (June 29, 2021).

<sup>13</sup> Prehearing Conference Tr. at 28-29 (Sept. 14, 2021).

The Attorney Examiner's ruling is unreasonable for the following reasons. First, the subpoena seeks information that is highly relevant and likely to lead to admissible evidence, for the reasons discussed above. Second, it would be no burden for FirstEnergy Corp. to produce these documents because it has already done so in civil litigation.

At the prehearing conference, FirstEnergy Corp.'s attorney misrepresented OCC's subpoena as not seeking the factual documents underlying the internal investigation. FirstEnergy Corp.'s attorney stated:

Now, if, in fact, what the OCC is asking for are – are factual documents that were considered during the investigation, we are not claiming that by the fact that something being considered investigation is now automatically privileged. However, that's not what the OCC asked for. They didn't make -- ask for factual documents. They asked for the internal investigation file. If they think the specific factual documents are, in fact, relevant to their – their subpoena or their investigation or this audit, they should ask for those factual documents and not seek the entire investigation file.<sup>14</sup>

OCC's subpoena asked for "all documents related to the internal investigation," which would include the factual documents the investigators reviewed. As these documents are relevant and would not be oppressive for FirstEnergy Corp. to produce, it was unreasonable for the Attorney Examiner to grant FirstEnergy Corp.'s motion to quash.

FirstEnergy Corp.'s attorney also appeared to concede that FirstEnergy Corp. has produced these documents to the parties in the various civil lawsuits against FirstEnergy Corp. arising out of the H.B. 6 matter:

MR. FINNIGAN: Your Honor, I would ask that in any of the numerous civil lawsuits that have been filed against FirstEnergy Corp., *whether anyone else has asked for this internal investigation report*, and if so, whether there is some privilege log

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<sup>14</sup> *Id.* at 26.



that they have already prepared in connection with those requests in the civil litigation that they could just use in this context.

MR. LEE: And, your Honor, may I speak to that?

EXAMINER PRICE: You may.

MR. LEE: In fact, that log -- not log, the internal investigation has been requested in other litigations. There have been objections to producing that and, in fact, parties there, in fact, have agreed that communications between outside counsel and the corporation need not be logged so there is no privilege log. *It has already been produced or already been made.*<sup>15</sup>

In any event, Chief Judge Marbley ordered FirstEnergy Corp. to produce all documents that FirstEnergy Corp. produced to the U.S. Attorney, FERC and the SEC, which presumably includes these factual documents underlying the internal investigation.<sup>16</sup>

The PUCO Attorney Examiner granted the motion to quash in large respect when it ordered FirstEnergy Corp. to produce only those documents related to the firings of its six executives. Because of this ruling, OCC will not be receiving documents relating to the other known corporate separation violations: (1) the payment of \$4.3 million to the former PUCO Chair; (2) the payments to Generation Now; and (3) the ten years of misallocated costs. Without these relevant documents from the internal investigation, neither OCC nor the PUCO will be able to conduct a thorough investigation of FirstEnergy Corp.'s and the FirstEnergy Utilities' corporate separation violations.

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<sup>15</sup> *Id.* at 28.

<sup>16</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Opinion and Order at 6 (June 14, 2021).

## **II. STANDARD OF REVIEW**

The PUCO will review an Attorney Examiner’s ruling if the Attorney Examiner (or other authorized PUCO personnel) certifies the appeal.<sup>17</sup> The standard applicable to certifying an appeal is that “the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question.”<sup>18</sup> Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.<sup>19</sup>

## **III. REQUEST FOR CERTIFICATION**

### **A. The ruling presents a new or novel question of interpretation of law or policy.**

The ruling presents a new or novel question of interpretation of law or policy regarding how the PUCO should coordinate discovery in its administrative cases when parallel discovery is ongoing in civil litigation arising out of the same facts. The context for consumer protection from FirstEnergy is what federal prosecutors have called “the largest bribery scheme ever” in Ohio.

The PUCO should take note that Attorney Examiner Price’s ruling appears to conflict with a recent U.S. District Judge’s ruling on discovery involving FirstEnergy Corp., the same law firm (Jones, Day) and the same facts as this case. On June 14, 2021, the U.S. District Court ordered FirstEnergy Corp. to produce to plaintiffs (shareholders) in the securities fraud case copies of all documents that FirstEnergy Corp. produced to the U.S. Attorney in the criminal investigation, to FERC for the FERC audit and to the SEC for the SEC’s audit of FirstEnergy

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<sup>17</sup> Ohio Adm. Code 4901-1-15(B).

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

<sup>19</sup> Ohio Adm. Code 4901-1-15(E).

Corp.'s H.B.6-related activities.<sup>20</sup> Millions of Ohio consumers deserve no less from their state regulator, the PUCO.

The Court's ruling protects FirstEnergy Corp.'s shareholders in the securities fraud case by giving them full access to all the information that FirstEnergy Corp. produced to the U.S. Attorney, FERC and the SEC, which presumably includes the underlying documents for the internal investigation. The PUCO Attorney Examiner's ruling harms two million FirstEnergy consumers by denying them access to the same information. The PUCO Commissioners should protect FirstEnergy's consumers by giving them the same information provided to FirstEnergy's shareholders in the federal securities fraud case.

**B. The discovery ruling represents a departure from past precedent.**

The discovery ruling also represents a departure from past precedent regarding: (1) the PUCO's enforcement of merger commitments; and (2) how the PUCO interprets the scope of its right to require a company to produce an internal investigation report.

When Ohio Edison merged with Centerior Energy Corporation, the FirstEnergy Utilities promised to make all relevant records of its affiliates available to the PUCO and OCC. The merger commitment states:

2. That in any proceeding before the PUCO, the Companies will make available to the PUCO and OCC all relevant books, records, employees, and officers of the Companies, and any affiliates or majority-owned subsidiaries of the Companies.<sup>21</sup>

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<sup>20</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Opinion and Order at 6 (June 14, 2021).

<sup>21</sup> *In the Matter of the Commission's Review of the Merger of Ohio Edison Company and Centerior Electric Corporation*, Case No. 96-1322-EL-MER, Comments of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 2 (February 18, 1997).

The FirstEnergy Utilities' previous objections that the documents should not be produced because they are not within their possession, custody or control, and are beyond the PUCO's jurisdiction violates this merger commitment. The PUCO should enforce the subpoena and require the FirstEnergy Utilities to honor their merger commitment to produce records from affiliates.

The PUCO has also ruled that an internal investigation report and company records that were part of the investigation are not automatically shielded from discovery under a privilege.<sup>22</sup> In *In re Dominion Purchased Gas Adjustment Case*, the PUCO ruled that OCC was entitled to an internal report prepared by Dominion in response to a civil lawsuit alleging improper cost-shifting on contracts to buy gas by the merchant company and by the utility.<sup>23</sup> Consistent with existing precedent, the PUCO should order FirstEnergy to produce all non-privileged documents relating to the internal investigation report.

The Attorney Examiner's ruling to limit production to the documents related to firing top executives was unreasonably narrow. The ruling disregards that the internal investigation covered many other topics that were apparent corporate separation violations, namely: (1) the \$4.3 million payment to a company associated with the former PUCO Chair; (2) the ten years of costs that were misallocated to the utilities; and (3) the payments to Generation Now that were allocated to the utilities. To the extent that FirstEnergy claims attorney-client privilege for any specific documents, it has the burden to establish this and the initial step would be for FirstEnergy to produce a privilege log to establish the grounds for any privilege claim for each specific document.

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<sup>22</sup> *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry (July 28, 2006).

<sup>23</sup> *Id.*

**C. An immediate determination is needed to prevent undue prejudice.**

This appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice<sup>24</sup> to OCC and Ohio consumers. Consumers may have been made to fund the illegal activities alleged in the criminal complaint through the rates they paid to FirstEnergy for electric utility service.

An immediate determination is needed to prevent the likelihood of further undue prejudice or expense to OCC and FirstEnergy’s consumers, beyond the ongoing prejudice of FirstEnergy’s delays of OCC’s review. The internal investigation documents cover the same subject matter of this proceeding. There is no question, even given what little OCC discovery has been answered, that there is a real issue pertaining to these apparent corporate separation violations. We know from the deposition of Mr. Fanelli, the audit in Case No. 20-1629-EL-RDR, FirstEnergy Corp.’s SEC disclosures and the deferred prosecution agreement<sup>25</sup> that corporate separation violations occurred. We don’t know if that is the full extent of these violations. The documents OCC seeks through this subpoena are essential for a full investigation of these matters.

**IV. APPLICATION FOR REVIEW**

OCC asks the PUCO Commissioners to reverse PUCO Examiner Price’s September 14, 2021 ruling, under O.A.C. 4901-1-15(B) and (E). That ruling quashed OCC’s subpoena of records related to the H.B. 6-related internal investigation by FirstEnergy Corp. (the company that was charged with and admitted to a federal crime). Unlike PUCO Attorney Examiner Price’s ruling in favor of the FirstEnergy Utilities, a U.S. District Judge has ordered FirstEnergy Corp. to

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<sup>24</sup> O.A.C. 4901-1-15(B).

<sup>25</sup> United States of America v. FirstEnergy Corp., Case No. 1:21-cr-86, Deferred Prosecution Agreement (July 22, 2021).

produce for plaintiffs (shareholders) in the securities fraud case copies of all documents that FirstEnergy Corp. produced to the U.S. Attorney, to FERC and to the SEC, which presumably includes the internal investigation documents.<sup>26</sup> Ohio consumers deserve no less from their state regulator, the PUCO. The PUCO's ruling is inconsistent with the federal judge's ruling allowing access to the documents that FirstEnergy Corp. in civil litigation.

In the Deferred Prosecution Agreement, FirstEnergy admitted that it paid \$60 million to Generation Now and other entities controlled by the former Speaker of the House (the Enterprise). In exchange for payments from FirstEnergy Corp., the Enterprise (including FirstEnergy Corp.) helped pass H.B. 6, described as a billion-collar "bailout" that saved from closure two failing nuclear power plants in Ohio affiliated with FirstEnergy Corp. The Enterprise then worked to corruptly ensure that H.B. 6 went into effect by defeating a ballot initiative.<sup>27</sup> (No FirstEnergy employees have been charged.)

FirstEnergy Corp.'s disclosures about its involvement with H.B. 6 led to several civil lawsuits. Through this interlocutory appeal, OCC seeks the same information that FirstEnergy Corp. presumably produced in those lawsuits.

**A. The information OCC seeks is within the permissible scope of discovery and is necessary for OCC to protect Ohio consumers, under the Ohio Administrative Code.**

The FirstEnergy Utilities claim that a privilege exists for certain documents related to the internal investigation. As the objecting party, they bear the burden to establish that a privilege exists that protects this information from discovery.<sup>28</sup> "The policy of discovery is to allow the

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<sup>26</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Opinion and Order at 6 (June 14, 2021).

<sup>27</sup> *Id.* at ¶9, Affidavit of Blane J. Wetzel in Support of a Criminal Complaint.

<sup>28</sup> *State ex rel. Fisher v. Rose Chevrolet, Inc.*, (C.A. 1992), 82 Ohio App.3d 520, 523.

parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts.”<sup>29</sup>

The PUCO's rules on discovery “do not create an additional field of combat to delay trials or to appropriate the Commission's time and resources; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings.”<sup>30</sup> The rules are also intended to “minimize commission intervention in the discovery process.”<sup>31</sup> These rules are intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C. 4903.082.

R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” *See* OCC v. PUC, 111 Ohio St.3d 300, 2006-Ohio-5789. The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases. Yet all these years after the 1983 reform law, the FirstEnergy Utilities impeding OCC's discovery efforts. The PUCO should not allow the FirstEnergy Utilities to obstruct and delay this process.

O.A.C. 4901-1-16(B) provides for the scope of discovery:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

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<sup>29</sup> In the Matter of the Investigation into the Perry Nuclear Power Plant, Case No. 85-521-EL-COI, Entry at 23. (Mar. 17, 1987).

<sup>30</sup> *Id.*, citing Penn Central Transportation Co. v. Armco Steel Corp. (C.P. 1971), 27 Ohio Misc. 76. (emphasis added).

<sup>31</sup> Ohio Admin. Code 4901-1-16(A).

The PUCO's rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.<sup>32</sup> Requests for production may elicit documents within the possession, custody, or control, of the party upon whom the discovery is served, under O.A.C. 4901-1-20.

OCC sought discovery of information relating to the internal investigation. This discovery seeks information that is relevant and is reasonably calculated to lead to the discovery of admissible evidence because the internal investigation covers several areas of apparent corporate separation violations. This PUCO case is a review of FirstEnergy's corporate separation violations related to H.B. 6. OCC's discovery satisfies the aforementioned standards in the Ohio Administrative Code.

**B. It was contrary to law and reason for the PUCO to deviate from its past precedent without a clear need and without explaining how its past precedent is in error.**

The PUCO failed to adhere to its own precedents regarding the production of relevant documents in the control of an affiliate and the production of internal investigation reports. The Supreme Court has ruled that the PUCO should respect its own precedents. It is essential that the PUCO respect its previous decisions and not depart from them without a clear need. In *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* the Supreme Court stated:

Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which

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<sup>32</sup> Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, citing to Moskowitz v. Mt. Sinai Med. Ctr. (1994), 69 Ohio St.3d 638, 661 and Disciplinary Counsel v. O'Neill (1996), 75 Ohio St.3d 1479.



is essential in all areas of the law, including administrative law.<sup>33</sup>

The PUCO violated this principle by not following its past precedent where it has required utilities to produce in discovery documents related to internal investigations. This creates a conflict in the PUCO's rulings regarding the discovery of non-privileged information relating to internal investigations. The PUCO should address this conflict by following its prior ruling in *In re Dominion Purchased Gas Adjustment Case*.<sup>34</sup> In the alternative, the PUCO must explain why its past ruling is in error.

The PUCO also violated this principle by not following the federal judge's ruling that required FirstEnergy Corp. to produce information to the securities fraud plaintiffs that FirstEnergy Corp. produced to FERC for the FERC audit.<sup>35</sup> The Attorney Examiner did not acknowledge the federal court ruling or try to distinguish it. In fact, the federal court ruling is a precedent directly on point that the Attorney Examiner should have followed.

The PUCO should take note that Attorney Examiner Price's ruling conflicts with a recent U.S. District Judge's ruling on discovery involving FirstEnergy Corp., the same law firm (Jones, Day) and the same facts as this case. On June 14, 2021, the U.S. District Court ordered FirstEnergy Corp. to produce to plaintiffs (shareholders) in the securities fraud case copies of all documents that FirstEnergy Corp. produced to the U.S. Attorney, SEC and FERC, which

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<sup>33</sup> 42 Ohio St.2d 403, 431 (1975).

<sup>34</sup> *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry (July 28, 2006).

<sup>35</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Opinion and Order at 6 (June 14, 2021).

presumably includes documents relating to the internal investigation.<sup>36</sup> Millions of Ohio consumers deserve no less from their state regulator, the PUCO.

The Court's ruling protects FirstEnergy Corp.'s shareholders in the securities fraud case by giving them full access to all the information that FirstEnergy Corp. produced to the U.S. Attorney, FERC and the SEC. The PUCO Attorney Examiner's ruling harms two million FirstEnergy consumers by denying them access to the same information. The PUCO Commissioners should protect FirstEnergy's consumers by giving them the same information provided to FirstEnergy's shareholders in the federal securities fraud case.

**C. It was unreasonable to interpret the law to quash OCC's subpoena seeking documents related to the internal investigation.**

The PUCO has broad authority to investigate public utilities under R.C. 4905.05, 4905.06, 4909.154 and Ohio Adm. Code 4901-1-12. Specifically, under R.C. 4905.06, the PUCO has "general supervision" over "all public utilities within its jurisdiction allowing the PUCO to "examine such public utilities" with respect to, among other things "*their compliance with all laws, orders of the commission.*" And the PUCO's jurisdiction also extends to "all other companies" (per R.C. 4905.05 including companies that are part of an electric utility holding company system) as to any matters that "may relate to the costs associated with the provision of utility service by public utilities in this state which are affiliated or associated with such companies."

The PUCO frequently relies on these statutes to obtain information from the parent companies in matters such as rate cases, where the parent company holds important information relevant to the utility's financial condition and its need for a rate increase. The PUCO also relies

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<sup>36</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Opinion and Order at 6 (June 14, 2021).

on these statutes when it must obtain information involving serious safety incidents, such as the 2003 FirstEnergy blackout<sup>37</sup> or the 2002 incident involving a large opening in the reactor head at the Davis-Besse nuclear plant.<sup>38</sup> The PUCO also relies on these statutes in cases of great public interest, such as investigating the cost overruns for the nuclear plants constructed in Ohio.<sup>39</sup> For that reason, the PUCO seemingly would want to interpret these jurisdictional statutes broadly to give itself full access to records that a utility produces related to an internal investigation of a matter of great concern to the PUCO. The Attorney Examiner's ruling creates a precedent that could block the PUCO's access to obtain important information in future cases.

In the name of justice for Ohio consumers, the PUCO should modify the Attorney Examiner's ruling and grant OCC access to all non-privileged documents related to the internal investigation.

## **V. CONCLUSION**

OCC's interlocutory appeal of Attorney Examiner Price's September 14, 2021 ruling meets the standard for granting interlocutory appeals. OCC's appeal on behalf of millions of Ohio consumers should be certified to the PUCO and the PUCO should reverse the Attorney Examiner's ruling. For consumer protection, the PUCO should expeditiously reverse its Examiner's ruling and not permit the FirstEnergy Utilities to thwart a thorough and proper PUCO investigation related to FirstEnergy Utilities violation of Ohio corporate separation law and PUCO corporate separation rules.

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<sup>37</sup> J.R. Minkel, *The Northeast Blackout: Five Years Later*, Scientific American (Aug. 13, 2008).

<sup>38</sup> NRC, *Background on Improvements Resulting From Davis-Besse Incident*, [www.nrc.gov](http://www.nrc.gov) (last accessed Sept. 20, 2021).

<sup>39</sup> J. P. Meissner, *The Legal Warriors* (2013).

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Interlocutory Appeal, Request for Certification to the Commission, and Application for Review by Office of the Ohio Consumers' Counsel was provided electronically to the persons listed below this 20th day of September 2021.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

- - -

In the Matter of the 2020 :  
Review of the Delivery :  
Capital Recovery Rider of :  
Ohio Edison Company, The : Case No. 20-1629-EL-RDR  
Cleveland Electric :  
Illuminating Company, and :  
The Toledo Edison Company.:

- - -

PREHEARING CONFERENCE

before Mr. Gregory Price, Ms. Megan Addison, and Ms.  
Jacky St. John Werman, Attorney Examiners, at the  
Public Utilities Commission of Ohio, via Webex,  
called at 10:01 a.m. on Tuesday, September 14, 2021.

- - -

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- - -

1           So we are not talking about a small  
2 amount of documents to log here. We are talking  
3 about potentially thousands of documents that would  
4 have to be logged, so we would object to having to go  
5 through a process of logging thousands of documents  
6 which are clearly on their face privileged.

7           Now, if, in fact, what the OCC is asking  
8 for are -- are factual documents that were considered  
9 during the investigation, we are not claiming that by  
10 the fact that something being considered  
11 investigation is now automatically privileged.

12 However, that's not what the OCC asked for. They  
13 didn't make -- ask for factual documents. They asked  
14 for the internal investigation file.

15           If they think the specific factual  
16 documents are, in fact, relevant to their -- their  
17 subpoena or their investigation or this audit, they  
18 should ask for those factual documents and not seek  
19 the entire investigation file.

20           EXAMINER PRICE: But you know what the --  
21 they have -- are you offering to provide to OCC all  
22 factual documents, or are you saying they should ask  
23 for them? Because I don't think they can ask for  
24 documents when they don't have -- have not received  
25 anything from you yet.

1 time as any. Sure.

2 MR. FINNIGAN: Your Honor, I would ask  
3 that in any of the numerous civil lawsuits that have  
4 been filed against FirstEnergy Corp., whether anyone  
5 else has asked for this internal investigation  
6 report, and if so, whether there is some privilege  
7 log that they have already prepared in connection  
8 with those requests in the civil litigation that they  
9 could just use in this context.

10 MR. LEE: And, your Honor, may I speak to  
11 that?

12 EXAMINER PRICE: You may.

13 MR. LEE: In fact, that log -- not log,  
14 the internal investigation has been requested in  
15 other litigations. There have been objections to  
16 producing that and, in fact, parties there, in fact,  
17 have agreed that communications between outside  
18 counsel and the corporation need not be logged so  
19 there is no privilege log. It has already been  
20 produced or already been made.

21 EXAMINER PRICE: Okay. Well, here is how  
22 we are going to proceed. Mr. Lee will produce a  
23 privilege log to the parties and the Examiners  
24 limited to documents, limited to reported decision to  
25 terminate certain executives for violation of

1 FirstEnergy policies and its code of conduct.

2 Mr. Lee will also produce for the Attorney Examiners  
3 a copy for in camera review of the internal  
4 investigation. We've heard a lot about this internal  
5 investigation, but we are in no position to make any  
6 rulings as to whether or not it's privileged sight  
7 unseen.

8 MR. LEE: Your Honor, I would also remind  
9 you that while -- there's another issue here beyond  
10 the privilege issue. There is both the  
11 investigation -- I am not even sure a final report  
12 exists. If there is one, we will log it but there is  
13 also a separate privilege between the independent  
14 board and FirstEnergy Corp. I am -- honestly do  
15 not -- this is an issue we -- had not been raised  
16 before, the independent committee's privilege versus  
17 the Company privilege, and I honestly do not know if  
18 the Company even has copies of those reports, or they  
19 are solely within the custody of the independent  
20 committee outside of FirstEnergy Corp.

21 EXAMINER PRICE: Well, I think we are  
22 going to stick to this ruling now.

23 MR. LEE: Okay.

24 EXAMINER PRICE: If you don't agree with  
25 the ruling, we've certainly had interlocutory appeals

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Summary: Request Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.