

In the Matter of the Review of the )  
Political and Charitable Spending by Ohio ) Case No. 20-1502-EL-UNC  
Edison Company, The Cleveland Electric )  
Illuminating Company, and the Toledo )  
Edison Company. )

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FirstEnergy paid \$60 million to Generation Now, a dark money group that is said to be connected with passage of H.B. 6.<sup>4</sup> The U.S. Attorney said: “Dark money is a breeding ground for corruption.”<sup>5</sup> AEP also contributed \$900,000 to Generation Now.<sup>6</sup> Coincidentally, AEP (along with Duke and AES) will receive lavish subsidies from H.B. 6 for the Ohio Valley Electric Corporation (“OVEC”) coal plants.

As stated, OCC’s September 8, 2020 motions asked the PUCO for audits regarding H.B. 6, among other things.<sup>7</sup> In response, PUCO Attorney Examiner Gregory Price ordered a review (without an audit) of the political and charitable spending by FirstEnergy’s utilities.<sup>8</sup> In this case, FirstEnergy has, in essence, been invited to investigate itself on whether it charged consumers to support the passage of H.B. 6 FirstEnergy.<sup>9</sup> The PUCO’s limited review and reliance on FirstEnergy’s self-reporting does not provide adequate consumer protections. On October 27, 2021, OCC filed motions for the PUCO to arrange for an independent audit and audit oversight committee. OCC’s motions should be granted.<sup>10</sup>

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<sup>4</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement (July 22, 2021).

<sup>5</sup> DOJ NEWS RELEASE, FEDERAL GRAND JURY INDICTS OHIO HOUSE SPEAKER ENTERPRISE IN FEDERAL PUBLIC CORRUPTION RACKETEERING CONSPIRACY INVOLVING \$60 MILLION (July 30, 2020).

<sup>6</sup> Anderson, D., *AEP contributed to dark money group that gave money to Generation Now*. Energy and Policy Institute (July 24, 2020); Anderson, D., *More Generation Now dark money traced to AEP in Ohio corruption scandal* (Dec. 2, 2020).

<sup>7</sup> *In the Matter of the Review 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*, Case Nos. 17-2474-EL-RDR & 17-974-EL-UNC Motion for a PUCO Investigation and Management Audit (Sept. 8, 2020).

<sup>8</sup> Entry (Sept. 15, 2020).

<sup>9</sup> Kowalski, K., *Ohio regulators decline to force FirstEnergy to hire an independent auditor*. Energy News Network (Sept. 18, 2020).

<sup>10</sup> Revised Motion for an Independent Auditor (Oct. 27, 2021).

The PUCO responded to OCC's September 8, 2020 Motion by requiring the FirstEnergy 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 effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state."<sup>11</sup> This was followed up by FirstEnergy's "response" denying that any H.B. 6 costs are in base rates; riders or charges.<sup>12</sup> The response was accompanied by an affidavit from Santino Fanelli, FirstEnergy's Director of Rates and Regulatory Affairs. FirstEnergy later followed its response with a supplemental response that it indeed had charged consumers for activities related to H.B. 6.

On October 9, 2020, OCC filed a notice to take Mr. Fanelli's deposition.<sup>13</sup> FirstEnergy tried to prevent the deposition,<sup>14</sup> and the deposition did not occur until five months later, on March 9-10, 2021. Mr. Fanelli revealed, for the first time, that in 2017, the FirstEnergy Utilities were charged \$500,000 for contributions to Generation Now and Hardworking Ohioans,<sup>15</sup> two dark money groups implicated in the criminal complaint against the former Speaker of the House. At the time, the FirstEnergy Utilities maintained that the funding was not determined to be political spending in support of H.B. 6.

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<sup>11</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, Entry at ¶5 (Sept. 15, 2020).

<sup>12</sup> *Id.*, Response to Show Cause Entry (Sept. 30, 2020).

<sup>13</sup> OCC Notice to Take Deposition (Oct. 9, 2020).

<sup>14</sup> FirstEnergy Motion for Protective Order (Oct. 16, 2020).

<sup>15</sup> Deposition of Mr. Santino L. Fanelli at 130 (Mar. 9, 2021).

Four months later, on July 20, 2021, FirstEnergy Corp. reached a DPA with the U.S. Attorney’s Office for the Southern District of Ohio. As part of the DPA, FirstEnergy Corp. “admits, accepts, and acknowledges that it is responsible under United States law for the acts as charged in the Information and as set for the in the Statement of Facts” involving the federal crime of honest services wire fraud.<sup>16</sup> The matter is said to involve bribery or kickbacks paid to public officials. It is said in the DPA that “FirstEnergy Corp. paid \$4.3 million dollars to Public Official B [the former PUCO Chair], through his consulting company in return for performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp’s interests relating to the passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”<sup>17</sup>

On Aug. 6, 2020, the FirstEnergy Utilities sought leave to supplement their response to the PUCO’s show cause order. In their supplemental response they claimed that after reviewing the DPA, they “determined that political spending in support of House Bill 6 impacted the Companies pole attachment rates.”<sup>18</sup> The rate impact “was attributable to a FirstEnergy Corp. payment of \$4,333,333, made on January 2, 2019 under a consulting agreement with Sustainability Funding Alliance (“SFA”), which the DPA indicates was political spending in support of House Bill 6.”<sup>19</sup> The FirstEnergy

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<sup>16</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 1 (July 22, 2021).

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

<sup>18</sup> Motion of the FirstEnergy Utilities for Leave to File a Supplemental Response, Exhibit A at 1 (Aug. 6, 2021).

<sup>19</sup> *Id.*

Utilities further claimed they were unaware that the \$4.3 million payment constituted political spending in support of HB 6.<sup>20</sup>

The PUCO is conducting four investigations that touch on FirstEnergy's H.B. 6-related activities and has ordered audits in three of those cases.<sup>21</sup> But in this case the PUCO did not order an audit. As a result, FirstEnergy has avoided a fuller investigation into its political and charitable spending in support of H. B. 6. That is a mistake in regulation. It should be corrected, as OCC has sought in a motion.

## **II. RECOMMENDATIONS FOR CONSUMER PROTECTION.**

This case proves the adage “the wheels of justice turn slowly.”<sup>22</sup> OCC has sought information on the FirstEnergy Utilities' role in H.B. 6 since September 8, 2020, following the federal law enforcement activities related to House Bill 6. Over one year later, on October 29, 2021, FirstEnergy began producing records it turned over to the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”).<sup>23</sup> OCC followed its September 8, 2020 motions with another motion for an audit on October 27, 2021.<sup>24</sup> In response, FirstEnergy did not object to OCC's call for an audit. But FirstEnergy objected to whether certain matters should be included within the scope of the audit and whether an independent oversight committee is needed.<sup>25</sup>

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

<sup>21</sup> [www.puco.ohio.gov/FirstEnergy](https://www.puco.ohio.gov/FirstEnergy) & HB 6 related cases, available at: <https://puco.ohio.gov/wps/portal/gov/puco/utilities/electricity/resources/hb-6-related-investigations>

<sup>22</sup> The Greek philosopher Sextus Empiricus wrote, some 1,600 years ago: “The mills of the gods grind slowly but they grind exceedingly small.” The Dictionary of Cliches by James Rogers (Wings Books, Originally New York: Facts on File Publications, 1985).

<sup>23</sup> Email from Erica Duff to all counsel of record in Case No. 20-1502-EL-UNC (Oct. 29, 2021).

<sup>24</sup> Revised Motion for an Independent Auditor (Oct. 27, 2021).

<sup>25</sup> FirstEnergy Memorandum Contra at 1 (Nov. 12, 2021).



Another important step toward truth and justice would be FirstEnergy providing and/or the PUCO ordering FirstEnergy to provide: (1) the documents FirstEnergy produced associated with FERC’s audit of FirstEnergy’s political and charitable spending and (2) FirstEnergy’s internal investigation report. These steps would conform to FirstEnergy’s pledge of being “deeply committed to creating a culture in which ... our leaders prioritize and encourage open and transparent communications with all of our stakeholders.”<sup>26</sup>

**A. For consumer protection, the PUCO should grant OCC’s motion to arrange for an independent, external auditor and independent audit oversight committee.**

United States District Judge Marbley recently emphasized the importance of an independent and disinterested review that must take place in an H.B.6-related shareholder derivative suit against officers of FirstEnergy.<sup>27</sup> That approach is what OCC was seeking on October 27, 2021, when OCC filed a motion to appoint an independent, external auditor and independent audit oversight committee.

Oversight that is independent from FirstEnergy and the PUCO is especially important for investigating the FirstEnergy payments to the former PUCO Chair (as discussed in the section below), which involved both FirstEnergy and the PUCO. The audit is needed for consumer protection and to instill transparency and public trust.<sup>28</sup>

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<sup>26</sup> K. Kowalski, *FirstEnergy’s transparency pledge clashes with ongoing actions*. Energy News Network (Apr. 19, 2021).

<sup>27</sup> <https://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=310677fd-c2bd-4c2a-a77b-b97c028c4297>

<sup>28</sup> Revised Motion for an Independent Auditor (Oct. 27, 2021).

The PUCO should grant OCC's motion to determine whether consumers were protected from the adverse impacts of FirstEnergy's political and charitable spending in support of H.B. 6.

- 1. The OCC motions for the PUCO to arrange an independent auditor (with oversight by an independent committee) should include investigating FirstEnergy's \$4.3 million payment to an entity associated with the former PUCO Chair and include the impact on consumers from FirstEnergy's relationship with the former PUCO Chair.**

FirstEnergy admitted paying a \$4.3 million "consulting fee" to an entity said to be associated with former PUCO Chair Sam Randazzo.<sup>29</sup> Ultimately, this transaction (among other things) became a subject of a FirstEnergy Board of Directors' investigation using an outside firm.

Information about this matter has been revealed by FirstEnergy and others in federal filings (such as the DPA), state filings and on discovery. In some text messages, the elements of the payment were described. (See Attachment)

In another PUCO investigation, we learned through discovery (and then from a FirstEnergy Advisors' filing in Case 20-103) about certain FirstEnergy text messages. A FirstEnergy text message references that the former PUCO Chair purportedly had a role in "burning" a final audit report by the PUCO-appointed auditor (Oxford Advisors) in Case 17-2474. And there was a FirstEnergy reference to some communication between FirstEnergy and the former PUCO Chair regarding the FirstEnergy Advisors application for an energy license in Case 20-103. (See Attachment)

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<sup>29</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 22, 2021).

Coincidentally, on February 26, 2020, PUCO Chair Sam Randazzo and other PUCO Commissioners announced a mystifying change of plans in Case 17-2474. They ruled that Oxford’s final audit report would *not* be filed regarding the infamous FirstEnergy distribution modernization charge.<sup>30</sup>

An interim audit report from Oxford was filed earlier and it contained interesting information about the DMR money collected from consumers: “[d]ollars collected by OH Utilities, including dollars collected through Rider DMR, are contributed to the Regulated Money Pool” and “[b]y moving the Rider DMR funds into the Ohio Utilities Regulated Money Pool – other non-OHIO regulated companies have borrowing access to the Rider DMR funds.”<sup>31</sup> (More recently, the PUCO hired a new auditor, Daymark, to produce an audit report in this case involving the distribution modernization rider.)

And emails that OCC obtained through a public records request in the FirstEnergy corporate separation investigation are indicative of the PUCO Staff limiting the scope of the corporate separation audit. There, the PUCO Staff appears to have prevented the PUCO’s audit from investigating H.B.6 activities and costs related to the corporate separation of the FirstEnergy Utilities. In the PUCO emails there are communications between the potential auditing contract bidders and the PUCO Staff. The potential bidders asked the PUCO Staff about the scope of the proposed corporate separation audit. Unfortunately for Ohio consumers, in a November 13, 2020 email the PUCO Staff answered “no” to a question from a potential bidder for the audit contract. The question

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<sup>30</sup> *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 No 17-2474-EL-RDR, Entry (Feb. 26, 2020).

<sup>31</sup> *Id.*, Oxford Advisors Mid-Term Report at 17 (June 14, 2019).

was “does it include an audit of whether the source of funds for political and charitable spending by the Companies in support of Am. Sub. H.B. 6 was from rates or charges paid by Ohio ratepayers?” A good answer for state regulation of FirstEnergy should have been “yes.” (See Attachment)

The DPA states that FirstEnergy Corp. paid the money (\$4.3 million) “with the intent and for the purpose that, in return, Public Official B [the former PUCO Chair] would perform official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”<sup>32</sup>

For these reasons, the PUCO should arrange for the independent audit and audit oversight committee that OCC seeks. The audit should include an investigation of the FirstEnergy payments (through Sustainability Funding Alliance) to the former PUCO Chair. And the audit should include an investigation of whether utility consumers were harmed in other ways by FirstEnergy’s relationship with the former PUCO Chair.

**B. The FirstEnergy Utilities’ responses (including the affidavit) to the PUCO’s Show-Cause Entry are inadequate for consumer protection and for compliance with the PUCO’s show-cause Entry, and should be investigated.**

In response to OCC filing investigatory motions, the PUCO opened this case with an Entry requiring FirstEnergy to show cause whether any H.B. 6-related costs were collected in consumer rates.<sup>33</sup> FirstEnergy responded with an affidavit from Mr. Fanelli stating that FirstEnergy’s rates do not include any political or charitable spending in

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<sup>32</sup> Deferred Prosecution Agreement at page 35.

<sup>33</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, Entry at ¶5 (Sept. 15, 2020).

support of H.B. 6.<sup>34</sup> But, at OCC’s deposition of Mr. Fanelli (that FirstEnergy tried to prevent and did delay), it became obvious that the FirstEnergy Utilities’ response to the PUCO Show-Cause Entry was inadequate.

At his deposition, Mr. Fanelli conceded that, for his affidavit, he did not actually review the underlying accounting records from 2016-2020 to determine whether his statements are true. Instead, he merely conducted a “conceptual review.”<sup>35</sup> He merely concluded that, based on his conceptual review, the FirstEnergy political or charitable spending “shouldn’t” be included in rates.<sup>36</sup> His approach certainly favored FirstEnergy, not accountability to consumers or compliance with the PUCO’s order. Mr. Fanelli’s conceptual review falls far short of complying with the PUCO’s order and with consumer protection.

In fact, Mr. Fanelli testified that FirstEnergy Service Company allocated \$500,000 to the FirstEnergy Utilities in 2017 for payments to two dark money groups – Generation Now and Hardworking Ohioans.<sup>37</sup> Mr. Fanelli, however, refused to concede that this was political spending in support of H.B. 6,<sup>38</sup> even though at the time of his deposition Generation Now had pled guilty to bribery charges in accepting the \$60 million from FirstEnergy.<sup>39</sup>

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<sup>34</sup> *Id.*, Response to Show Cause Entry (Sept. 30, 2020).

<sup>35</sup> Fanelli Depo. Tr. 206.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 130-131.

<sup>38</sup> *Id.* at 61. *See also* Prehearing Tr. at 10-13 (Apr. 4, 2021).

<sup>39</sup> Kovac, M., *Federal judge accepts guilty plea from dark money group Generation Now in HB 6 scandal*. The Columbus Dispatch (Feb. 18, 2021).

In addition, the FirstEnergy Utilities took the position in responding to discovery that “activities in support of H.B. 6 did not begin until the bill was introduced in 2019,”<sup>40</sup> even though the criminal complaint states that the H.B. 6 conspiracy began in 2017.<sup>41</sup> (This position by FirstEnergy was properly rejected by the Attorney Examiner.)<sup>42</sup> With such a narrow definition of H.B. 6 costs, the FirstEnergy Utilities’ denials that H.B. 6 costs are included in rates is meaningless.

The PUCO’s Delivery Capital Recovery Rider (“DCR”) audit established that FirstEnergy’s rates included political spending in support of H.B. 6.<sup>43</sup> The audit also found other improper allocations going back in some cases ten years. These findings in the DCR audit establish that FirstEnergy’s “conceptual review” approach to the Show-Cause Entry was inadequate and requires further investigation.

FirstEnergy’s response to the PUCO’s Show-Cause Entry warrants an investigation because it is troubling in at least two respects. First, its Director of Rates and Regulatory Affairs (Mr. Fanelli) knew that Generation Now costs were charged to the FirstEnergy Utilities when preparing the response. But he did not disclose this information to the PUCO and parties. Instead, he changed the accounting records to remove the charges.<sup>44</sup>

Second, the FirstEnergy Utilities claimed in their Supplemental Response that they didn’t know the \$4.3 million payment to Mr. Randazzo was for political purposes until they read about it in the Deferred Prosecution Agreement. This is an interesting claim, given that FirstEnergy

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<sup>40</sup> Prehearing Tr. at 10-13 (Apr. 4, 2021).

<sup>41</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).

<sup>42</sup> Fanelli Depo. Tr. 257.

<sup>43</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1629-EL-RDR, Entry (Mar. 10, 2021).

<sup>44</sup> Fanelli Depo. at 129-137 (Mar. 10, 2021).

Corp. shares with the FirstEnergy Utilities many of the same board members, executive leadership, inside lawyers, outside lawyers and shared services employees.

Based on this information, the PUCO should investigate whether FirstEnergy's initial and supplemental responses to the Show-Cause Entry were complete and accurate.

**C. For consumer protection, the PUCO should require FirstEnergy to release the internal investigation report related to H.B. 6 that its independent board of directors conducted (and release any other FirstEnergy internal reports related to H.B. 6).**

FirstEnergy's independent board members conducted an internal investigation of FirstEnergy's H.B. 6-related activities.<sup>45</sup> Following an in-camera review, PUCO Attorney Examiner Gregory Price ruled that the report is shielded from discovery by the attorney-client privilege and the work product privilege.<sup>46</sup> OCC filed an interlocutory appeal on this issue.<sup>47</sup> OCC recently filed a motion to supplement its interlocutory appeal with a new ruling from a Maryland Public Service Commissioner. The ruling (which was subject to appeal) granted the motion to compel filed by the Maryland People's Counsel (OCC's counterpart) to obtain the FirstEnergy Board's H.B.6 investigation report.<sup>48</sup>

The PUCO should order FirstEnergy to release the report by the Board of Directors and any other H.B. 6-related reports.

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<sup>45</sup> FirstEnergy Corp., Annual Report (Form 10-K) at 125 (Feb. 18, 2021).

<sup>46</sup> Entry at ¶ 20 (Oct. 12, 2020).

<sup>47</sup> Interlocutory Appeal (Oct. 28, 2021).

<sup>48</sup> Motion to Accept Statement of Additional Authority (Nov. 19, 2021).

**D. For consumer protection, the PUCO's review of FirstEnergy's political and charitable spending should cover the time period of January 1, 2017 through December 31, 2020.**

The PUCO did not specify any time period when it opened this investigation.

The PUCO opened the case with a show-cause order directing FirstEnergy to demonstrate:

that the costs of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state.<sup>49</sup>

Mr. Santino L. Fanelli, FirstEnergy's Director of Rates and Regulatory Affairs, prepared an affidavit supporting FirstEnergy's response to the show cause order. OCC took his deposition. During the deposition, it became apparent that FirstEnergy viewed the time period for the PUCO's investigation too narrowly.<sup>50</sup> H.B. 6 became law in April 2019, and FirstEnergy only went back to January 1, 2019 in responding to the show-cause Entry.<sup>51</sup> The PUCO Attorney Examiner ruled during the deposition that the time period should go back to September 1, 2017.<sup>52</sup>

Initially, it appeared that this investigation only needed to extend through January 22, 2020. This is the date when the group seeking the referendum stopped litigating whether it could get an extension of time to collect signatures to put the referendum on the ballot.<sup>53</sup>

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<sup>49</sup> Entry at ¶ 5 (Sept. 15, 2020).

<sup>50</sup> Response to Show Cause Entry (Sept. 30, 2021).

<sup>51</sup> Deposition of Mr. Santino L. Fanelli at 256 (Mar. 10, 2021).

<sup>52</sup> *Id.* at 257.

<sup>53</sup> J. Pelzer, *House Bill 6 referendum effort is dead after group drops lawsuit appeal*, Cleveland.com (Jan. 22, 2020).



Later, it became obvious that the investigation should cover the time period at least through the date (November 20, 2020) Mr. Randazzo resigned as PUCO Chair, so the date should be set at December 31, 2020.<sup>54</sup>

The PUCO Attorney Examiner initially ruled that FirstEnergy's payments to Mr. Randazzo should not be treated as political spending in support of H.B. 6.<sup>55</sup> Later, in the DPA, FirstEnergy Corp. admitted making payments to Mr. Randazzo for political purposes.<sup>56</sup> On August 6, 2021, the FirstEnergy Utilities also admitted that FirstEnergy made payments to Mr. Randazzo for political purposes.<sup>57</sup> The FirstEnergy Utilities said they learned about it by reading it in the DPA (even though the companies share many of the same directors, executives, officers and lawyers).<sup>58</sup>

Based on FirstEnergy's recent admissions that the payments to Mr. Randazzo were for political purposes, the PUCO's investigation in this case should cover the period of January 1, 2017 through December 31, 2020.<sup>59</sup>

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<sup>54</sup> A. Chow & G. Rosenberg, *PUCO Chair Sam Randazzo Resigns Following FBI Search*, *FirstEnergy Report*. WOSU.org/news (Nov. 20, 2020).

<sup>55</sup> Deposition of Mr. Santino L. Fanelli at 253 (Mar. 10, 2021).

<sup>56</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 34-43 (July 22, 2021).

<sup>57</sup> Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company's Supplemental Response to the September 15, 2020 Show Cause Entry at 1 (Aug. 6, 2021).

<sup>58</sup> Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company's Supplemental Response to the September 15, 2020 Show Cause Entry at 1 (Aug. 6, 2021).

<sup>59</sup> A. Chow & G. Rosenberg, *PUCO Chair Sam Randazzo Resigns Following FBI Search*, *FirstEnergy Report*. WOSU.org/news (Nov. 20, 2020).

- E. For consumer protection, the PUCO should order FirstEnergy to expand its response to the Show-Cause Entry to include the cost of internal services and expenditures, which the PUCO previously excluded. In its review of FirstEnergy’s political and charitable spending, the PUCO should identify any and all costs for both internal and external FirstEnergy services and expenditures that supported the activities described in the DPA.**

PUCO Attorney Examiner Gregory Price ruled that, for discovery purposes, the parties could only inquire about political and charitable spending for *outside* services in support of H.B. 6.<sup>60</sup> That ruling is too narrow for consumer protection. It should be expanded.

About one week before the U.S. Attorney filed the criminal complaint against the former Speaker of the Ohio House, Commonwealth Edison entered into a DPA. There, it agreed to a \$200 million fine for arranging jobs, awarding contracts and paying money to benefit the Illinois House Speaker, Mike Madigan, in exchange for Madigan passing a 2011 grid modernization law and a 2016 nuclear bailout law.<sup>61</sup>

In response to Com Ed’s admission, the Illinois legislature passed a law. The law broadly allows the Illinois Commerce Commission to order restitution for any amounts that “*Commonwealth Edison collected, spent, allocated, transferred, remitted, or caused in any other way to be expended ratepayer funds in connection with the conduct detailed in the DPA.*”<sup>62</sup>

In the words of the Illinois consumer protection law, the PUCO should be conducting a broad *investigation as to whether FirstEnergy collected, spent, allocated,*

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<sup>60</sup> Deposition of Mr. Santino L. Fanelli at 257-260 (Mar. 10, 2021).

<sup>61</sup> *Id.*; J. Meisner & R. Long, *ComEd Scheme to Influence Madigan Was Not Legal Lobbying – It Was Bribery, Prosecutors Say*, Chicago Tribune (Aug. 24, 2021).

<sup>62</sup> 220 ILCS 5/4-604.5 (Emphasis added).

*transferred, remitted, or caused in any other way to be expended ratepayer funds in connection with the conduct detailed in the DPA.*<sup>63</sup> This broad approach will cover all expenditures, including for internal services, that may have been charged to utility consumers for H.B. 6 activity.

As stated, the PUCO Attorney Examiner previously ruled that, for discovery purposes, the parties could only inquire about political and charitable spending for outside services in support of H.B. 6.<sup>64</sup> The premise for this ruling was that political and charitable spending for H.B. 6 would be covered in the audit in Case No. 17-974-EL-UNC, the PUCO's investigation into whether FirstEnergy's H.B. 6 activities violated corporate separation law.<sup>65</sup>

We now know, regrettably and inexplicably, that the PUCO's corporate separation audit did not cover any political and charitable spending related to H.B. 6. Daymark, the PUCO's corporate separation auditor, stated this disclaimer in its report:

While information or documents produced in response to other audits or investigations may be relevant to evaluating whether FirstEnergy's conduct in a particular situation was a violation of the laws and rules governing corporate separation, *they were not evaluated as part of this audit.* (Emphasis added.)<sup>66</sup>

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<sup>63</sup> 220 ILCS 5/4-604.5(b) (Emphasis added).

<sup>64</sup> Deposition of Mr. Santino L. Fanelli at 257-260 (Mar. 10, 2021).

<sup>65</sup> *Id.*

<sup>66</sup> *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, Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio at 1 (Sept. 13, 2021) (hereinafter referred to as "Daymark Audit").

The PUCO should therefore investigate in this case whether *any* H.B. 6-related charges to consumers were made by FirstEnergy (including for payments to the former PUCO Chair), *regardless of whether the spending was for internal services or external services*.

FirstEnergy should not be allowed to keep any charges to consumers for any costs for H.B. 6 (including the anti-referendum campaign). The H.B. 6 scheme occurred over a long period of time, from 2017-2020, and FirstEnergy updated many riders during this period. It is clear that FirstEnergy's original response and its supplemental response to the Show-Cause Entry only focused on external services – *and inadequately at that*.

The PUCO should issue an order requiring FirstEnergy to supplement its affidavit response to the Show-Cause Entry to include the cost for internal services and expenditures during 2017-2020 that helped implement H.B. 6, the anti-referendum campaign, and dealings with Mr. Randazzo in his capacity as PUCO Chair.

**F. For consumer protection, the PUCO should require FirstEnergy to produce a list of charges to Account 923 (Outside services employed) during the referendum period, for which any costs were distributed, allocated or assigned to FirstEnergy's Ohio utilities. The information should include the name of the vendor, the date of the charge, the amount of the charge and a brief description of the service provided.**

An Energy and Policy Institute report shows the magnitude of FirstEnergy Service Company's indirect charges to the utilities for Account 923 costs.<sup>67</sup> The report states that FirstEnergy Service Company charged \$144 million for external affairs support to FirstEnergy's utility companies during 2017 through 2019.<sup>68</sup> About \$137

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<sup>67</sup> D. Anderson, *13 FirstEnergy utilities paid \$144 million for external affairs to service company involved in Ohio bribery scandal* (Feb. 10, 2021).

<sup>68</sup> *Id.*

million of the \$144 million was charged to Account 923.<sup>69</sup> The PUCO's investigation should therefore cover FirstEnergy Service Companies' political and charitable spending in support of H.B. 6 or the referendum that was classified in Account 923, for which any costs were distributed, allocated or assigned to the FirstEnergy Ohio Utilities. The PUCO Attorney Examiner previously ruled that political and charitable spending by the FirstEnergy Service Company that was charged to the Ohio utilities is within the scope of this investigation.<sup>70</sup>

Most of the H.B. 6 costs were spent on the anti-referendum campaign. The PUCO should require FirstEnergy to produce a list of charges to Account 923 during the referendum period, for which any costs were distributed, allocated or assigned to FirstEnergy's Ohio utilities. The PUCO should require this information for the time period of April 1, 2019 through April 1, 2020. This is the period when most of the H.B. 6 spending occurred, per the criminal complaint against the former Ohio House Speaker.<sup>71</sup> The information should include the name of the vendor, the date of the charge, the amount of the charge and a brief description of the service provided.

House Bill 6 became law in April 2019 and most of the H.B. 6 expenditures were used to defeat the referendum, as shown above. FirstEnergy has taken an unreasonably narrow view of the scope of this investigation and can't be relied upon to identify which spending was related to H.B. 6.

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<sup>69</sup> *Id.*

<sup>70</sup> Deposition of Mr. Santino L. Fanelli at 261-262 (Mar. 10, 2021).

<sup>71</sup> *U.S. v. Householder*, Case No. 1:20-cr-00077-TSB. Complaint at 16 (S.D. Ohio) (July 21, 2020).

Requiring FirstEnergy to produce detailed information on Account 923 charges, as described above, will allow the PUCO and other parties to determine which costs are related to the anti-referendum campaign. This information that FirstEnergy should provide should then be investigated by the auditor that OCC has asked the PUCO to arrange.

**G. For consumer protection, an expanded Show-Cause Entry should also require the FirstEnergy Utilities to show whether FirstEnergy Corp. allocated any costs to the FirstEnergy Utilities arising from the FirstEnergy Solutions bankruptcy settlement and, if so, whether such costs related to H.B. 6.**

The PUCO should also expand the Show-Cause Entry for another issues. The PUCO should require the FirstEnergy Utilities to show whether FirstEnergy Corp. allocated any costs to them arising from the FirstEnergy Solutions bankruptcy settlement and, if so, whether such costs related to H.B. 6.

This is a complex issue but the threat to consumers is real. When FirstEnergy Solutions filed for bankruptcy, FirstEnergy Service Company continued to provide shared services throughout the bankruptcy case.<sup>72</sup> FirstEnergy Solutions emerged from bankruptcy (as Energy Harbor) on February 27, 2020.<sup>73</sup> FirstEnergy paid money that was used to defeat the referendum, and the majority of this spending occurred during the third quarter of 2019 (about \$18 million).<sup>74</sup> FirstEnergy Service Company transmitted nearly

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<sup>72</sup> J. Funk, *Bankruptcy court oks FirstEnergy Solutions settlement, setting stage for reorganization*. Cleveland.com (Jan. 29, 2019).

<sup>73</sup> P. Fitzgerald, *FirstEnergy Solutions Exits Bankruptcy as Energy Harbor*. Wall Street Journal (Feb. 27, 2020).

<sup>74</sup> *U.S. v. Householder*, Case No. 1:20-cr-00077-TSB. Complaint at 15-16 (S.D. Ohio) (July 21, 2020).

all of these payments to Generation Now.<sup>75</sup> FirstEnergy Solutions directed a significant amount of these payments.

In an amended answer in a civil case, FirstEnergy stated:

FirstEnergy admits that between August 1, 2019 and October 2019, FirstEnergy Service Company, *as directed by FirstEnergy Solutions Corp.* n/k/a Energy Harbor, wire transferred \$25,738,591 from FirstEnergy Solutions Corp. to Generation Now.<sup>76</sup>

Given that FirstEnergy Solutions directed these payments, FirstEnergy Service Company might have billed the cost of these payments to FirstEnergy Solutions. FirstEnergy Corp. reached a settlement with FirstEnergy Solutions, its creditors and other parties that allowed FirstEnergy Solutions to emerge from bankruptcy (as Energy Harbor). Among other terms, the settlement called for FirstEnergy Corp. to credit FirstEnergy Solutions \$112.5 million toward the cost of charges by FirstEnergy Service Company.<sup>77</sup> If FirstEnergy Corp. charged any of those costs to the Ohio utilities, then consumers indirectly paid H.B. 6 costs.

The PUCO should expand the Show-Cause Entry. The PUCO should require the FirstEnergy Utilities to show whether FirstEnergy Corp. distributed, allocated or assigned to FirstEnergy's Ohio utilities any costs from the bankruptcy settlement, including whether these costs were reflected as higher administrative and general costs. If so, the PUCO should further require the FirstEnergy Utilities to show how the \$112.5 million settlement was determined. And the PUCO should require the Utilities to show whether

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<sup>75</sup> *Id.*

<sup>76</sup> *Smith v. FirstEnergy Corp.*, Case No. 2:20-cv-03755. First Amended Answer of FirstEnergy Corp. at 6 (Mar. 31, 2021) (Emphasis added).

<sup>77</sup> J. Funk, *Bankruptcy court oks FirstEnergy Solutions settlement, setting stage for reorganization*, Cleveland.com (Jan. 29, 2019).

FirstEnergy Solutions owed FirstEnergy Service Company any unpaid amounts for Generation Now or H.B. 6 referendum payments at the time of the bankruptcy settlement. The PUCO must resolve these issues to protect consumers from paying for H.B. 6 costs or the costs of the referendum.

**H. For consumer protection, the PUCO should reserve final judgment on this case until all its audits are completed, the FERC audit is completed, the SEC investigation is completed, the FirstEnergy Board's investigation is released (which the PUCO should order now), and any other sources of information are considered (such as any related further federal criminal investigations and shareholder lawsuits).**

The PUCO should confirm that any forms of political or charitable spending on H.B. 6 and the FirstEnergy relationship with the former PUCO Chair were not charged to utility consumers. The PUCO should review this matter by arranging now for an independent auditor (and an independent audit oversight committee), as requested in OCC's pending motion filed on October 27, 2021. And the PUCO should consider its other related investigations, the FERC audit, and the SEC investigation. The PUCO should also now order the release of the FirstEnergy Board's investigation. And it should consider any other sources of relevant information (such as any related further federal criminal investigations and shareholder lawsuits).

If any improper charges to consumers are found, the PUCO should order FirstEnergy to refund, with interest, any and all such charges. Such charges would violate Ohio ratemaking standards.

Moreover, the PUCO should impose forfeitures for any violations of regulations involved with any improper charges. Forfeitures are allowed under R.C. 4905.54.



### III. CONCLUSION

Justice Louis Brandeis famously said that sunlight is the best disinfectant.<sup>78</sup> The Ohio Consumers' Counsel's recommendations to the PUCO should be adopted to shine that light. More light is needed on whether FirstEnergy utility consumers have been charged for "the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio."<sup>79</sup>

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ Maureen R. Willis  
Maureen R. Willis, Senior Counsel  
Counsel of Record (# 0020847)  
John Finnigan (#0018689)  
Assistant Consumers' Counsel

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(Willing to accept service by e-mail)

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<sup>78</sup> Louis Brandeis, "What Publicity Can Do," in *Other People's Money and How the Bankers Use It* (1914).

<sup>79</sup> Horn, D. *Ohio House Speaker Larry Householder arrested in \$60 million bribery case*. The Cincinnati Enquirer (July 31, 2020).

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of these Comments were served on the persons stated below via electronic transmission, this 29th day of November 2021.

/s/ Maureen R. Willis  
Maureen R. Willis  
Senior Regulatory Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

### **SERVICE LIST**

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## Short Message Report

Conversations: 1	Participants: 3
Total Messages: 6	Date Range: 12/18/2018

## Outline of Conversations

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 **NODISPLAY** 6 messages on 12/18/2018 • Charles Jones Jr • Michael Dowling • Sam Randazzo

**Messages in chronological order** (times are shown in GMT -05:00)

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**NODISPLAY**

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SR     **Sam Randazzo**     12/18/2018, 9:53 PM  
2019 1,633,333  
2020 600,000  
2021 600,000  
2022 600,000  
2023 600,000  
2024 300,000  
  
Total 4,333,333  
  
Thanks for the visit. Good to see both of you.

MD     **Michael Dowling**     9:55 PM  
Got it, Sam. Good seeing you as well. Thanks for the hospitality. Cool condo.

CJ     **Charles Jones Jr**     10:30 PM  
Sam,  
Do you send an invoice every year?

SR     **Sam Randazzo**     10:32 PM  
Yes - the current cycle has me sending an invoice for the scheduled annual payment in Juke or July. And there is an existing PO number associated with the invoice.

CJ     **Charles Jones Jr**     10:33 PM  
You send it to Brad Bingaman?

SR     **Sam Randazzo**     10:37 PM  
I believe Brad is the person who received and processed the invoice last year (2018). In the past, we actually split the payment into two invoices to stay, I think, within payment authorization limits. I don't know if there has been any change. Prior to that, Ebony received the invoices.

**Short Message Report**

Conversations: 1	Participants: 2
Total Messages: 1	Date Range: 3/3/2020

**Outline of Conversations**

**NODISPLAY** 1 message on 3/3/2020 • Charles Jones • Dennis Chack

**Messages in chronological order** (times are shown in GMT -04:00)



**NODISPLAY**

DC

**Dennis Chack**

3/3/2020, 11:23 AM

Any luck on talking with Sam on energy license we just received request for additional comments

## Short Message Report

Conversations: 1	Participants: 2
Total Messages: 5	Date Range: 3/4/2020

### Outline of Conversations



**NODISPLAY** 5 messages on 3/4/2020 • Charles Jones • Dennis Chack

**Messages in chronological order** (times are shown in GMT -05:00)



**NODISPLAY**

- CJ Charles Jones** 3/4/2020, 2:57 PM  
He will get it done for us but cannot just jettison all process. Says the combination of over ruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us? He'll move it as fast as he can. Better come up with a short term work around.
- DC Dennis Chack** 3:05 PM  
Ok thanks for discussing with him. How are you feeling
- CJ Charles Jones** 3:09 PM  
[REDACTED]  
[REDACTED] Stopped by Sam's today on my walk. He has friends down and has been busy but he was out doing some yard work. Walking about 3 miles a day right now. A little bored since I cant golf or even get in the pool. But better than sitting in Ohio. Weather has been beautiful last 3 days.
- DC Dennis Chack** 3:14 PM  
It was not the best the days we were there
- CJ Charles Jones** 3:14 PM  
I know. Pretty chilly and windy.



**From:** [Mccarter, Doris](#)  
**To:** "Marie Fagan"  
**Subject:** RE: RFP RA20-CA-X, questions  
**Date:** Friday, November 13, 2020 4:16:00 PM  
**Attachments:** [image007.png](#)

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I am so sorry. I forgot. Actually, it has to be for the whole period because we want the entire corporate separation audit and Sage was only a subset of the corporate separation rules, with a heavy focus on Code of Conduct.

**Doris E. McCarter**

Grid Modernization and Retail Markets Division  
Rates and Analysis Department  
Public Utilities Commission of Ohio  
180 East Broad Street, 3<sup>rd</sup> Floor  
Columbus, Ohio 43215  
[Doris.mccarter@puco.ohio.gov](mailto:Doris.mccarter@puco.ohio.gov)

---

**From:** Mccarter, Doris  
**Sent:** Friday, November 13, 2020 4:07 PM  
**To:** Marie Fagan <[marie@londoneconomics.com](mailto:marie@londoneconomics.com)>  
**Subject:** RE: RFP RA20-CA-X, questions

Hello.

The answers to your first and second questions are, "No." This is a standard corporate separation audit.  
The answer to the third question is that you do not need to audit the time period of the Sage audit, just the time period before and after it.

**Doris E. McCarter**

Grid Modernization and Retail Markets Division  
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Columbus, Ohio 43215  
[Doris.mccarter@puco.ohio.gov](mailto:Doris.mccarter@puco.ohio.gov)

---

**From:** Marie Fagan <[marie@londoneconomics.com](mailto:marie@londoneconomics.com)>  
**Sent:** Friday, November 13, 2020 2:04 PM  
**To:** Mccarter, Doris <[doris.mccarter@puco.ohio.gov](mailto:doris.mccarter@puco.ohio.gov)>  
**Subject:** RFP RA20-CA-X, questions

Dear Ms. McCarter,  
London Economics is pleased to have the opportunity to bid on RFP RA20-CA-X. Related to that, we have a handful of questions:

- 1) Does the audit requested in RFP RA20-CA-X include the item in paragraph 12 of the Commission's Entry of November 4, 2020 in Case No. 17-974-EL-UNC? In other words, does it include an audit of the Distribution Modernization Rider ("DMR"), to examine whether FirstEnergy improperly used funds collected in the DMR?
- 2) Does the audit requested in RFP RA20-CA-X include the item in paragraph 15 of the Commission's Entry of November 4, 2020 in Case No. 17-974-RL-UNC? In other words, does it include an audit of whether the source of funds for political and charitable spending by the Companies in support of Am. Sub. H.B. 6 was from rates or charges paid by Ohio ratepayers?
- 3) The audit requested in RFP RA20-CA-X will cover the period November 1, 2016 through October 31, 2020; this period encompasses the period (June 28, 2017 through February 28, 2018) which was included in a previous audit of FirstEnergy's compliance with corporate separation rules performed by Sage Management Consultants, LLC and published May 14, 2018 in Case No. 17-0974-EL-UNC ("Sage Report"). Does audit requested in RFP RA20-CA-X include a detailed audit and re-examination of the time period already covered in the Sage Report? Or does the audit requested in RFP RA20-CA-X envision that the consultant will limit its activities with respect to the June 28, 2017- February 28, 2018 time period to reviewing and commenting on the Sage Report, and focus its detailed audit on the time periods before and after the Sage Report time period?

Many thanks,  
Marie Fagan



Marie Fagan, PhD  
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*London Economics International, LLC ("LEI") is an economic and financial consulting company with two decades of experience advising both private and public entities in energy and infrastructure markets. LEI publishes bi-annual market reviews of all US and Canadian regional power markets available at [www.londoneconomicspress.com](http://www.londoneconomicspress.com).*

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**From:** [Mccarter, Doris](#)  
**To:** [Fieldman, Alyson](#)  
**Cc:** [Wiefling, Guler Ann](#); [Molter, Lindsey](#)  
**Subject:** RE: RFP Clarification Questions  
**Date:** Friday, November 20, 2020 9:30:00 AM

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Hello Everyone,

The Order language was just to give background around various other proceedings occurring at the PUCO. That text refers to another case. The audit that will be the subject of this case is a traditional corporate separation audit.

I need an overall cost (cap) from you. However, I will still need that broken down by specific task areas, hours per tasks, person/cost per hour per task. Such a breakdown informs me as to the level of effort going into the audit, the areas of effort, the competencies engaged in the areas of review and also your understanding of/approach to the audit.

The hearing costs can be delineated as a per hour charge, since it is unknown if a further proceeding will be needed. Please be certain to make it a separate section of your bid.

***Doris E. McCarter***

[Grid Modernization and Retail Markets Division](#)  
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**From:** Fieldman, Alyson <Alyson.Fieldman@marcumllp.com>  
**Sent:** Friday, November 20, 2020 8:36 AM  
**To:** Mccarter, Doris <doris.mccarter@puco.ohio.gov>; Molter, Lindsey <Zee.Molter@puco.ohio.gov>  
**Cc:** Wiefling, Guler Ann <Guler.Wiefling@marcumllp.com>  
**Subject:** RFP Clarification Questions

Good morning, Ms. McCarter and Ms. Molter,

Marcum LLP will be submitting a proposal in response to the RFP that PUCO has issued as it relates to an audit / investigation of First Energy Corp. We understand from the RFP that one of the engagement's purposes will be to review the company's compliance with the Corporate Separation Rules adopted by PUCO.

Paragraph 15 of the order that PUCO issued on 11/4/2020 regarding this RFP, states that PUCO has "opened proceedings to review whether any political and charitable spending by the Companies in support of Am. Sub. H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state." The RFP, however, does not explicitly include this as an objective of the work to be undertaken by the selected auditor. Does PUCO wish the selected auditor to conduct tests in order

to determine whether such contributions were directly or indirectly paid by ratepayers?

Separately, the RFP on page 2 states that "the proposed costs shall be considered firm prices for performing the work described in the proposal." Can you please clarify whether PUCO is asking for a fixed price for this engagement or whether it is asking for hourly rates by level of resource with such rates remaining constant for the duration of the engagement?

Thank you for your time and we look forward to your response.

Kind regards,  
Alyson

**Alyson Fieldman**  
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**11/29/2021 5:05:01 PM**

**in**

**Case No(s). 20-1502-EL-UNC**

Summary: Comments Comments for Protection of FirstEnergy Utility Consumers by  
Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham  
on behalf of Willis, Maureen R Mrs.