

**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.)

**REPLY TO PUCO STAFF'S OPPOSITION TO OCC'S SUBPOENA FOR DEPOSITION
OF PUCO-APPROVED AUDITOR (OXFORD ADVISORS) RELATED TO THE
INVESTIGATION OF FIRSTENERGY
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The PUCO Staff asks the PUCO to not sign OCC's subpoena to enable OCC to depose the PUCO-hired auditor, Oxford Advisors. Oxford filed an audit report on June 14, 2019 in Case No. 17-2474-EL-RDR involving FirstEnergy's infamous distribution modernization rider (DMR). The subpoena, sought in this case and Case No. 17-2474 is for Oxford to attend and give testimony once for both cases at a deposition to be held on January 6, 2022, beginning at 10:00 a.m. at OCC's office. In this case, the Auditor's testimony is important for exploring corporate separation violations. For instance, if the DMR funds collected from consumers were used to benefit FirstEnergy affiliates, there could be a violation of Ohio's corporate separation law for electric utilities.

OCC's request for a subpoena in both of these cases investigating FirstEnergy was prompted in part by shocking FirstEnergy text messages (that OCC obtained through an earlier subpoena) in which FirstEnergy's fired CEO Chuck Jones referenced the former PUCO Chair as

“burning the DMR final report” that was to be produced by Oxford.¹ (A final report was not produced).² Elsewhere, FirstEnergy Corp. has been charged with a federal crime related to the House Bill 6 scandal. The FirstEnergy Utilities are subsidiaries of FirstEnergy Corp.

II. ARGUMENT

A. **An auditor hired by the PUCO who is an independent state contractor that has completed his audit is subject to discovery under R.C. 4903.082 in this case affecting the public interest.**

The PUCO Staff asserts that the state hired Auditor, Oxford Advisors, is exempt from discovery, including deposition. The PUCO Staff argues that “the Commission’s rules do not permit discovery upon Staff.”³ The PUCO Staff claims that Oxford was “operating as an extension of the Commission Staff and is entitled to the same exemption from discovery as applies to Staff.”⁴ The Staff asserts that “the language of the Commission rule [4901:1-25(D)] is clear” in this regard.⁵

The clear language of the rule exempts “a member of the commission staff” from discovery by third parties. The language contains no reference to persons “operating as an extension” of the “commission staff.” The PUCO’s rules do not protect Oxford Advisors (the auditor), the “third party monitor” who was originally tasked with reviewing FirstEnergy’s

¹ See, e.g., *In the Matter of the Application of Suvon, LLC*, Case No. 20-103-EL-AGG, Motion to Withdraw the Certification Application at Exhibit A (Nov. 2, 2021).

² *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, Memorandum Contra to the Motion for Subpoena For Audit Report and Related Documents at 1 (Nov. 4, 2021).

³ Memorandum Contra at 2.

⁴ *Id.*

⁵ *Id.*

distribution modernization rider.⁶ Oxford was retained in 2018 by the PUCO as an “independent contractor” who was to produce, *inter alia*, a final report to be docketed with the PUCO 90 days after the termination of Rider DMR or its extension.⁷ Oxford Advisors is not “a member of the commission staff.”

Even if considered an “extension” of the PUCO Staff, that extension has been out of service long ago. Oxford completed all of its contract work for the PUCO. Recall that on February 26, 2020, then Chair Randazzo and PUCO Commissioners Conway, Deters, Friedeman and Trombold dismissed the DMR case sua sponte and closed the record.⁸ That ruling ended Oxford’s involvement to complete and file its final review of Rider DMR.

The discovery rule that the PUCO Staff relies on exempts a “member of the commission Staff” from discovery, not an independent contractor who no longer works for the PUCO. Further, the rule only prevents “premature disclosure” – disclosure that occurs while the investigation is continuing.⁹ Here there is no premature disclosure involving the PUCO Staff performing its duties because the duties of Oxford are over. Long over.

Moreover, the PUCO Staff focuses too much on its own agency’s rules that, unfortunately, are designed to prevent discovery of that public agency (the PUCO). R.C. 4903.082 contains no such exemption of the PUCO Staff from discovery. In a recent case, the Ohio Supreme Court ruled that the PUCO erred when it failed to rule on discovery motions filed

⁶ *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. 17-2474-EL-UNC, Entry (Dec. 13, 2017).

⁷ *Id.*, Entry (Jan. 24, 2018).

⁸ *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).

⁹ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Entry at ¶5 (Aug. 23, 1991).

by parties prior to issuing an order on the merits.¹⁰ The Court confirmed that “intervening parties in proceedings before the PUCO also have a statutory right to discovery under R.C. 4903.082.”¹¹

The PUCO Staff’s broad reading of the rules is not supportable for shielding the state-hired auditor in the DMR case from discovery in both this case and the DMR investigation. Nor should it be.

B. If a waiver of the deposition rules is necessary, the PUCO should find good cause and allow OCC to depose Oxford.

OCC does not concede that a waiver of O.A.C. 4901-1-25(D) is necessary because the state hired auditor is not “a member of the commission staff.” Moreover, R.C. 4903.082 allows this discovery. Nonetheless, the PUCO should find good cause for a waiver if it deems it necessary.

The PUCO Staff argues that a waiver of O.A.C. 4901-1-25(D), as OCC alternatively sought, “is neither proper or appropriate in these circumstances.”¹² The PUCO Staff asserts that the exemption from discovery is not a “requirement” that can be waived under O.A.C. 4901-1-38(B). The PUCO Staff claims that the subpoena rule, though requiring others to attend and give testimony at a deposition, exempts it from that requirement. The PUCO Staff reasons that with no requirement for the Staff to attend and give testimony at deposition, the waiver rule does not apply. The PUCO Staff’s reading – that favors secrecy and limiting information about the FirstEnergy scandal – is flawed and contrary to the public interest.

¹⁰ *In re Application of Savon*, Slip Op. 2021-Ohio-3630 at ¶42 (Oct. 14, 2021).

¹¹ *Id.*

¹² Memorandum Contra at 2.

Under O.A.C. 4901-1-38(B), the PUCO may “waive any *requirement, standard, or rule* set forth in O.A.C., Chapter 4901-1.”¹³ The prohibition against subpoenaing a member of PUCO Staff in O.A.C. 4901-1-25(D) is certainly a “standard” or “rule” in O.A.C. Chapter 4901-1. It is also a “requirement.” O.A.C. 4901-1-25(D) requires that parties *not* subpoena a member of the PUCO Staff. The requirement in O.A.C. 4901-1-25(D) against subpoenaing a member of the PUCO Staff is one of prohibition, rather than permission. That makes it no less of a “requirement,” contrary to Staff’s assertions otherwise. Whether styled a “standard,” “rule,” or “requirement,” the PUCO has the authority to waive O.A.C. 4901-1-25(D) under O.A.C. 4901-1-38(B).

The PUCO Staff also asserts that OCC has “failed to demonstrate that ‘good cause’ exists to *require* Staff to attend a discovery deposition in this, or any, matter before the Commission.”¹⁴ The Staff insists that the PUCO must balance discovery rights “against the integrity of its investigatory process” citing to R.C. 4901.16.¹⁵ Raising “integrity” as a reason to deny OCC’s deposition is an interesting argument by the PUCO Staff. It is interesting considering that the reason for OCC’s subpoena involves a fired FirstEnergy CEO’s text message about the PUCO purportedly “burning” a state (PUCO) audit report. And the CEO’s former employer, FirstEnergy Corp., stands charged with a federal crime.

Further, the statute precludes “employees or agents” of the PUCO from divulging information acquired while acting as an employee or agent of the PUCO. But what the PUCO Staff neglects to mention, is that the PUCO has interpreted this statute (R.C. 4901.16) to apply

¹³ *In the Matter of the Complaint of Citizens Against Clear Cutting, et al.*, Case No. 17-2344-EL-CSS, Entry (Mar. 8, 2018), 2018 PUC Lexis 254, *17-18 (italics added).

¹⁴ Memorandum Contra at 3.

¹⁵ *Id.*

during the conduct of the investigation, not after the investigation has been completed.¹⁶ In other words, the non-disclosure period under R.C. 4901.16 only applies while the investigation is continuing—meaning that the audit is still underway. Here the DMR audit was completed nearly two years ago.

Additionally, Ohio’s public records law (R.C. 149.43), coupled with the PUCO’s additional requirements for public records (4901.12 and 4905.07) “provide a strong presumption in favor of disclosure.”¹⁷ Accordingly, any exceptions in that law (e.g., R.C. 4901.16) that permit certain types of records to be withheld from disclosure must be narrowly construed.¹⁸ Thus, Staff’s seeming reliance on R.C. 4901.16 is not well founded.

Interestingly while the PUCO Staff states that “OCC may well be entitled to its examination [of Oxford], but not in discovery,” it indicates that it is not calling a representative of Oxford Advisors as its witness in the DMR proceeding.¹⁹ The PUCO Staff also expresses doubt as to how Oxford’s audit would have any relevance to the matters currently before the

¹⁶ See, e.g., *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-5906-EL-FAC, Entry at ¶18 (Reversing the Attorney Examiner’s Entry (on interlocutory appeal) and finding that R.C. 4901.16 does not prohibit the release of a draft audit report provided to the utility after the final audit report was docketed, but before the evidentiary hearing was conducted); *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 ¶18 (Dec 30, 2020) (ordering the release of a draft audit report, prior to the evidentiary hearing despite claims related to R.C. 4901.16).

¹⁷ See, for example, *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (Oct. 18, 1990).

¹⁸ *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 21; *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 17; *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 30 (“Insofar as Akron asserts that some of the requested records fall within certain exceptions to disclosure under R.C. 149.43, we strictly construe exceptions against the public records custodian, and the custodian has the burden to establish the applicability of an exception.”).

¹⁹ Memorandum Contra at 4, footnote 2.

PUCO.²⁰ Regarding relevance, the PUCO Staff apparently is not acknowledging that these cases are about the FirstEnergy scandal and that scandal has reached the PUCO itself in addition to House Bill 6.

When the PUCO reopened the DMR case and ordered a new audit, the PUCO found good cause under “the unique circumstances at this time” and given the “interests of both transparency and state policy.”²¹ The PUCO-referenced “unique circumstances at this time”²² involving what federal prosecutors have described as likely the largest bribery and money-laundering scheme that has “ever been perpetrated against the people of the state of Ohio.”²³ And in this case, based on information supplied by FirstEnergy Corp. in its Form 8-k, the PUCO found it necessary that “we take additional action to ensure compliance by the Companies and its affiliates with the corporate separation provisions of R.C. 4928.17 and with the Companies’ Commission-approved corporate separation plans.”²⁴ Later, under the Deferred Prosecution Agreement filed July 22, 2021, FirstEnergy Corp. was charged with (and admitted to the underlying facts of) the federal crime of honest services wire fraud in defrauding the public. The criminal charge relates to bribery or kickbacks to public officials for making \$60 million in dark money payments associated with tainted HB6.²⁵

²⁰ *Id.*

²¹ *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 at ¶22 (Dec. 30, 2020).

²² *Id.*

²³ J. Carr Smyth and J. Seewer “Ohio Speaker, 4 others arrested in 17-2474 \$60M bribery case” AP News (July 21, 2020).

²⁴ *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).

²⁵ *United States of America v. FirstEnergy Corp.*, Cas No. 1 :21-cr-86, Deferred Prosecution Agreement at 16 (July 22, 2021).

According to the federal Deferred Prosecution Agreement “FirstEnergy Corp. paid \$4.3 million dollars to Public Official B [Former PUCO Chair Randazzo] through his consulting company in return for Public Official B performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to passage of nuclear legislation and other specific First Energy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”²⁶ *A FirstEnergy CEO text message, first partially disclosed in the Deferred Prosecution Agreement, referenced the PUCO Chair “burning the final DMR report.”*²⁷

Given the magnitude of the information made public by the Deferred Prosecution Agreement in *United States v. FirstEnergy Corp.*, the federal indictments and elsewhere, the PUCO and its Staff should be conducting an earnest investigation into FirstEnergy activities that could have harmed utility consumers.

But the PUCO Staff would have the PUCO deter a real investigation of FirstEnergy by denying OCC’s subpoena. That comes on the heels of the PUCO Staff instructing potential bidders that the audit contract in this case does *not* include the House Bill 6 scandal.²⁸ The PUCO Staff is right that the integrity of the PUCO’s investigatory process is at issue here, but the Staff is missing the point about the integrity that is at issue.²⁹ Allowing full disclosure of such information would help achieve Chairperson French’s objective to provide “more transparency”

²⁶ *Id.* at 17.

²⁷ *See, e.g., In the Matter of the Application of Suvon, LLC*, Case No. 20-103-EL-AGG, Motion to Withdraw the Certification Application at Exhibit A (Nov. 2, 2021).

²⁸ *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, OCC/NOPEC Motion for Supplemental Audit, Attachment A (Nov. 5, 2021).

²⁹ Memorandum Contra at 3.

“to lift the ‘black cloud’ of [the] HB 6 scandal.”³⁰ OCC’s one time deposition of Oxford Advisors in this case and Case No. 17-2474 should go forward.

IV. CONCLUSION

In the interest of truth and justice for FirstEnergy’s two million utility consumers, the PUCO should overrule its Staff’s objection and issue OCC’s subpoena for the PUCO’s former auditor to give testimony at the upcoming deposition in this case and in Case No. 17-2474 that OCC scheduled for January 6, 2022.

Respectfully submitted,

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³⁰ J. Pelzer, New PUCO Chair Jenifer French: more transparency needed to lift the ‘black cloud’ of the HB 6 scandal, Cleveland.com (May 18, 2021).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the persons stated below via electric transmission this 3rd day of January 2022.

/s/ Maureen R. Willis

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