

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the	)	
Distribution Modernization Rider of	)	Case No. 17-2474-EL-RDR
Ohio Edison Company, the Cleveland	)	
Electric Illuminating Company, and the	)	
Toledo Edison Company.	)	

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**APPLICATION FOR REHEARING  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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September 22, 2023

(willing to accept service by email)

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On August 23, 2023, the PUCO approved a third stay of its investigations (and by extension the Ohio Consumers' Counsel's investigations) into the House Bill 6 scandal involving FirstEnergy and Ohio government. With its Entry, the PUCO will have denied millions of Ohio utility consumers from getting much-needed answers from FirstEnergy (and others) for a year and a half.

The PUCO ruled as follows:

By letter filed on August 10, 2023, the U.S. Attorney requested a second extension of the existing stay. Similar to its August 16, 2022 request, the U.S. Attorney noted its concern that continued discovery in the Commission's four investigations may directly interfere with or impede the United States' ongoing investigation into alleged corruption relating to Am. Sub. H.B. 6.

The U.S. Attorney's most recent correspondence makes it clear that its investigation is still ongoing and, thus, the interference concerns cited in our August 24, 2022 Entry remain largely at issue.<sup>1</sup>

In reviewing the fairness of a settlement of the shareholder derivative litigation, U.S. District Judge John R. Adams noted the importance of the public's interest:

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<sup>1</sup> Entry at ¶¶ 8, 9 (Aug. 23, 2023).

[G]iven that it is alleged that FirstEnergy executives perpetrated a scheme that impacted nearly every Ohioan, the Court cannot agree that FirstEnergy's interests are the sole interests that should be taken into account in this matter.

It is not only the trust of FirstEnergy that must be rebuilt. This bribery scheme has undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials. The public has a right to know how it is that the political process was so easily corrupted.<sup>2</sup>

More recently, the court hearing the FirstEnergy shareholder class action lawsuits denied a motion for protective order by Mr. Jones and Mr. Dowling to stay discovery based on the pending criminal investigation:

This case has been pending for nearly three years. Discovery is set to close in October 2023. (Doc. 458). And while the Court has granted several extensions to the case schedule in hopes that certain privilege disputes may be narrowed or mooted by the conclusion of the *Householder* case, it recently represented that it was disinclined from granting further extensions. (*Id.*). This case must proceed. And Movants' interests in staying this litigation to protect their Fifth Amendment rights—interests which have no foreseeable conclusion—will bring the progress of this case to a halt.<sup>3</sup>

Moreover, the Ohio Attorney General has argued for a resumption of litigation in a civil case. In a court filing, the Attorney General wrote: "Criminal justice has been had. Civil justice for the State of Ohio should commence."<sup>4</sup>

Accordingly, the Office of the Ohio Consumers' Counsel ("OCC") seeks rehearing of the PUCO's Entry. Two years ago, FirstEnergy admitted that it paid \$4.3

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<sup>2</sup> *Miller v. Anderson*, Case No. 5:20-cv-1743, Order at 7-9 (March 22, 2022).

<sup>3</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, Opinion and Order at 9 (May 19, 2023).

<sup>4</sup> *State of Ohio ex rel. Dave Yost, Ohio Attorney General v. FirstEnergy Corp. et al.*, Case No. 20-CV-628, Motion to Lift Stay of Proceedings at 1 (March 9, 2023).

million to former PUCO chair Sam Randazzo for certain corporate purposes. FirstEnergy agreed the money would be paid so that Mr. Randazzo “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>5</sup>

We and the public still don’t know the extent of former Chair Randazzo’s official actions that he undertook for FirstEnergy Corp. “as requested and as opportunities arose.” We and the public don’t know the extent of how those actions may have harmed Ohio electric utility consumers. And we and the public still don’t know how much of the public corruption was underwritten by FirstEnergy utility consumers – meaning at their expense.

At the same time, FirstEnergy is pressing for the PUCO to approve its fifth electric security plan and its massive investment in grid modernization, both to be paid by FirstEnergy consumers. Our ability to investigate is stayed. But FirstEnergy’s ability to seek more rate increases is not stayed.

This is so despite the PUCO acknowledging that OCC’s statutory rights (R.C. 4928.145), to learn of a potential side deal in FirstEnergy’s fourth electric security plan, may have been trampled by FirstEnergy. The PUCO stayed that investigation even before the U.S. Attorney requested a stay.<sup>6</sup> The use of stays seems asymmetrical, in favor of FirstEnergy and to the disfavor of consumers.

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<sup>5</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 35 (July 20, 2021).

<sup>6</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 (Dec. 15, 2021).

Therefore, the PUCO's Entry is unjust, unreasonable and unlawful in the following respects:

**ASSIGNMENT OF ERROR NO. 1:** The PUCO erred when for the third time it approved the U.S. Attorney's request for a six-month stay of the FirstEnergy investigations because it failed to properly apply the six-factor test to determine whether a stay should be issued. The PUCO should move forward (and allow parties to move forward) with investigations into FirstEnergy's bad acts and how Ohio utility consumers were harmed. The PUCO's stay of its investigations is inconsistent with other civil cases against FirstEnergy that are continuing.

**ASSIGNMENT OF ERROR NO. 2:** The PUCO erred in extending the stay of the proceedings which precludes parties from exercising their right to discovery under Ohio law (R.C. 4903.082) and Ohio Rule (O.A.C. 4901-1-16) Discovery is ongoing in the civil suits against FirstEnergy. Discovery should resume. No further stay should have been granted.

**ASSIGNMENT OF ERROR NO. 3:** Allowing another six-month stay is unjust and unreasonable because it denies consumers the prompt resolution that consumers should be given.

**ASSIGNMENT OF ERROR NO. 4:** Granting the stay without the PUCO requiring FirstEnergy Corp. to preserve documents and records as unjust and unreasonable and prejudicial to consumers.

**ASSIGNMENT OF ERROR NO. 5:** Granting the stay without the PUCO also staying FirstEnergy's Grid Mod I, Grid Mod 2 and ESP V cases was unjust and unreasonable and harmed consumers.

OCC asks the PUCO to modify on rehearing its August 23, 2023 Entry and lift the stay on the four PUCO House Bill 6 investigations. And if the stay is NOT lifted, it should stay as well FirstEnergy's ESP V and its Grid Mod I and II cases which are inextricably linked with the findings and the outcome of the four HB 6 investigations.

OCC's Application for Rehearing is more fully explained by the accompanying Memorandum in Support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The PUCO has four investigations,<sup>7</sup> initiated largely at OCC’s request, relating to the FirstEnergy House Bill 6 scandals. United States District Judge Algenon Marbley described the scandals as FirstEnergy’s “*unparalleled corruption* of Ohio’s democratic process.”<sup>8</sup> On August 23, 2023, the PUCO approved the U.S. Attorney’s third six-month request to stay these investigations into the FirstEnergy House Bill 6 scandal. OCC respects the role of the U.S. Attorney.

It’s time to get back to work for Ohioans regarding the investigations into FirstEnergy. Based on the FirstEnergy/U.S. deferred prosecution agreement (among other things), consumers deserve answers now. Consumers have a right to know how deep the corruption runs, including into ratemaking, when it comes to FirstEnergy and its relationship with former PUCO Chair Randazzo. We still don’t know the extent of former Chair Randazzo’s official actions that he undertook for FirstEnergy Corp. “as requested and as opportunities arose” and how those actions harmed Ohioans. And we still don’t

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<sup>7</sup> Case No. 17-974-EL-UNC, 20-1502-EL-UNC, 17-2474-EL-RDR and 20-1629-EL-RDR.

<sup>8</sup> *Emp. Retirement Sys. of City of St. Louis v. Jones*, Case No. 2:20-cv-4813, Order of Final Settlement Approval at 17 (Aug. 23, 2022) (Emphasis added).



know how much of the public corruption was underwritten by FirstEnergy consumers. Justice delayed is justice denied, especially when it comes to evidence, witnesses and recollections that fade or go missing with the passage of time.

If the PUCO nonetheless maintains the stay in these investigations (it should not), it should likewise stay other FirstEnergy proceedings which are linked to the investigations. Those proceedings, at a minimum include FirstEnergy's fifth electric security plan<sup>9</sup> and its Grid Mod (phase I and II).<sup>10</sup> Going forward with these other proceedings which are inextricably linked to the stalled investigations would be inefficient and prejudicial to consumers. As the PUCO acknowledged, the public has an interest in the efficient use of Commission resources.<sup>11</sup>

Presently, consumers are being denied the fairness of balance and symmetry in regulation. That's because the PUCO-initiated cases with potential outcomes adverse to FirstEnergy are stayed but cases that FirstEnergy initiated for charging consumers higher rates are ongoing. Staying the pending FirstEnergy proceedings would be fair to FirstEnergy's two million consumers.

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<sup>9</sup> *In re FirstEnergy ESP V*, Case No. 23-301-EL-SSO.

<sup>10</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *In the Matter of the Filing by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company of a Grid Modernization Business Plan*, Case No. 16-481-EL-UNC.

<sup>11</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, Entry at ¶ 79 (Aug. 24, 2022).

## II. GROUNDS FOR REHEARING

**ASSIGNMENT OF ERROR NO. 1: The PUCO erred when for the third time it approved the U.S. Attorney’s request for a six-month stay of the FirstEnergy investigations because it failed to properly apply the six-factor test to determine whether a stay should be issued. The PUCO should move forward (and allow parties to move forward) with investigations into FirstEnergy’s bad acts and how Ohio utility consumers were harmed. The PUCO’s stay of its investigations is inconsistent with other civil cases against FirstEnergy that are continuing.**

The U.S. Attorney filed his first request for a stay because “[t]rial for two individuals [Householder and Borges] charged in the indictment is scheduled to begin in January 2023.”<sup>12</sup> The U.S. Attorney’s second request for a stay was because “[t]rial for two individuals [Householder and Borges] charged in the indictment commenced in January 2023 and is underway.”<sup>13</sup> *However, the U.S. Attorney filed his third request for a stay not because of indictments but because he is conducting “an ongoing investigation.”*<sup>14</sup>

The PUCO’s previous two stay orders were based, in large part, on the fact that individuals were indicted, and trials were pending at the time. Although the U.S. Attorney is still conducting an ongoing investigation, no further indictments are pending at this time. And there is no pending trial. These are far different circumstances than what existed before. The present circumstances do not warrant a stay in discovery for the four PUCO investigations.

The PUCO’s first stay order noted that a stay order is generally unjustified in the absence of an indictment. The PUCO stated: “[C]ourts generally do not stay proceedings

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<sup>12</sup> Request of the United States Attorney to Stay All Discovery at 1 (Aug. 16, 2022).

<sup>13</sup> Request of the United States Attorney to Stay All Discovery at 1 (Feb. 23, 2023).

<sup>14</sup> Correspondence from the U.S. Department of Justice at 1 (Aug. 9, 2023).

in the absence of an indictment.”<sup>15</sup> Indeed, courts have noted that “[a] stay of civil proceedings due to a pending criminal investigation is ‘an extraordinary remedy.’”<sup>16</sup> There is no need for the extraordinary remedy of a stay at this point. What is needed for consumers are answers now.

The PUCO’s insistence on a stay of these proceedings is also inconsistent with the approach taken in other forums where discovery of H.B. 6 public corruption is ongoing. Ohio utility consumers deserve just as much of an opportunity to litigate their case as do the plaintiffs in the various civil suits against FirstEnergy.

In *State of Ohio ex rel. Dave Yost, Ohio Attorney General v. FirstEnergy Corp.*, the Ohio Attorney General persuaded Franklin County Common Pleas Judge Chris Brown to lift a stay in a civil action against FirstEnergy and others related to the FirstEnergy/House Bill 6 scandals. Arguments raised by the Attorney General<sup>17</sup> included that:

- All federal criminal defendants have had their charges resolved;
- FirstEnergy has a deferred prosecution agreement and thus there will not be criminal actions against it;
- FirstEnergy has settled numerous suits; and
- Energy Harbor has been sold-emphasizing the need to preserve documents and ensure that liabilities are not shed by corporate restructuring.<sup>18</sup>

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<sup>15</sup> Entry at 23 (Aug. 24, 2022), *quoting F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 628 (6<sup>th</sup> Cir. 2014).

<sup>16</sup> *Baird v. Daniels*, 2013 U.S. Dist. LEXIS 109603 at \*2, *quoting Louis Vuitton v. LY USA, Inc.*, 676 F.3d 83, 93 (2d Cir. 2012).

<sup>17</sup> *State of Ohio ex rel. Dave Yost, Ohio Attorney General v. FirstEnergy Corp. et al.*, Case No. 20-CV-628, Motion to Lift Stay of Proceedings (March 9, 2023).

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

In response to the Attorney General's motion, Judge Brown lifted the stay.<sup>19</sup> The PUCO should have followed suit. The same logic for lifting the stay applies here to the four PUCO investigations. The stay should have been denied.

Attempts to stay discovery in other ongoing federal civil proceedings have also failed. In a recent order denying FirstEnergy's request to stay discovery in the federal shareholder derivative litigation, Chief Judge Marbley aptly described the ongoing discovery in the federal civil actions against FirstEnergy:

[D]iscovery is proceeding in parallel cases. FirstEnergy turned over voluminous documents to the government in connection with the deferred prosecution agreement-many of which are now being produced in response to discovery requests in the RICO class action. (ECF No. 127 at 8 (citing docket entries in *Smith v. FirstEnergy Corp.*, No. 2:20-cv3755 (S.D. Ohio)). Last month, the Northern District of Ohio denied a motion to stay discovery in its derivative action. *Miller v. Anderson*, 2021 WL 0780, at \*1 (Sept. 16, 2021) (appeal filed). And, in June the Court lifted its stay in the securities fraud class action as to documents produced in other matters.<sup>20</sup>

More recently, the court hearing the FirstEnergy shareholder class action lawsuits denied a motion for protective order by Mr. Jones and Mr. Dowling to stay discovery based on the pending criminal investigation:

This case has been pending for nearly three years. Discovery is set to close in October 2023. (Doc. 458). And while the Court has granted several extensions to the case schedule in hopes that certain privilege disputes may be narrowed or mooted by the conclusion of the *Householder* case, it recently represented that it was disinclined from granting further extensions. (*Id.*). This case must proceed. And Movants' interests in staying this litigation to protect

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<sup>19</sup> *State of Ohio ex rel. Dave Yost, Ohio Attorney General v. FirstEnergy Corp. et al.*, Case No. 20-CV-628 Entry (March 15, 2023).

<sup>20</sup> *Employees Retirement System of the City of St. Louis v. Jones*, Case No. 2:20-cv-4813, 2021 WL 2414763 (Oct. 20, 2021).

their Fifth Amendment rights—interests which have no foreseeable conclusion—will bring the progress of this case to a halt.<sup>21</sup>

There is no reason that the investigations before the PUCO should be treated any differently than the civil litigation. Discovery should not be stayed. FirstEnergy utility consumers' interests are no less meaningful than the interests of customers and shareholders in the state and federal civil suits against FirstEnergy. It is unjust and unreasonable to singularly stay the PUCO investigations when civil litigation is allowed to proceed.

Importantly, a six-factor test is used to determine whether a civil case should be stayed due to overlapping issues with a criminal case.<sup>22</sup> The PUCO reviewed these factors in great detail when issuing the initial stay order.<sup>23</sup> The PUCO did not do the same in-depth review when it issued this third stay order.<sup>24</sup>

Circumstances have changed greatly since the PUCO issued its first stay order. A more recent analysis of the six-factor stay test reveals that the factors weigh in favor of denying a stay. This more recent analysis comes from the federal securities fraud litigation, where Judge Marbley denied Mr. Jones and Mr. Dowling's motion for a protective order to prevent their depositions from being taken due to the pending criminal investigation.<sup>25</sup>

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<sup>21</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, Opinion and Order at 9 (May 19, 2023).

<sup>22</sup> *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611 (6th Cir.2014).

<sup>23</sup> Entry (Aug. 24, 2022).

<sup>24</sup> Entry (Aug. 23, 2023).

<sup>25</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, Opinion and Order (May 19, 2023).

Judge Marbley denied Mr. Jones and Mr. Dowling’s request to stay discovery. Judge Marbley’s ruling was based upon an analysis of the six stay factors that the PUCO acknowledged and applied in its earlier ruling permitting the U.S. Attorney’s initial stay. Judge Marbley made the following determination on the six-factor test:

**1. Status of the Criminal Case**

Judge Marbley found that the status of the criminal case weighs against a stay. In making this determination, Judge Marbley found:

Under this factor, “[a] stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct[.]” *Id.* at 628 (quoting *Trustees of Plumbers & Pipefitters Nat. Pension Fund v. Transworld Mech., Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)). This makes sense. “[T]he likelihood that a defendant may make incriminating statements is greatest after an indictment has issued,” and any prejudice to the civil plaintiffs “is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act considerations.” *E.M.A. Nationwide*, 767 F.3d at 628 (quoting *Transworld Mech.*, 886 F. Supp. at 1139).

Movants have not been indicted. They say that the government’s representations that its investigation is ongoing, coupled with “numerous statements” about the Movants in the *Householder* trial, suggest that they are subject to ongoing criminal investigation. (Doc. 453 at 7–8). Even still, “a stay of civil proceedings due to a pending criminal investigation is an extraordinary remedy’ that is not generally granted in the absence of an indictment.” *Kirby Dev., LLC v. XPO Glob. Forwarding, Inc.*, No. 2:18-CV-500, 2018 WL 6075071, at \*4 (S.D. Ohio Nov. 20, 2018) (quoting *E.M.A. Nationwide*, 767 F.3d at 627–28). Accordingly, the Court finds that this factor weighs against a stay.<sup>26</sup>

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<sup>26</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, Opinion and Order at 6 (May 19, 2023).

There is no reason why the PUCO should come to any different conclusion. Mr. Randazzo has not been indicted. As noted, a stay while a criminal investigation is pending is an extraordinary remedy that is not generally granted without indictment.

## **2. Interest of and Prejudice to Class Plaintiffs**

Judge Marbley noted that the third factor favors the plaintiffs:

\* \* \* The Court must balance Plaintiffs’ “‘interest in proceeding expeditiously against the prejudice that a delay would cause.’” *Johnson, next friend of C.P.S. v. Hamilton Cty. Gov’t*, No. 1:19-CV-329, 2020 WL 6479558, at \*3 (E.D. Tenn. Feb. 26, 2020) (*quoting In re Flint Water Cases*, No. 5:16-cv-10444, 2019 WL 5802706, at \*3 (E.D. Mich. Nov. 7, 2019)). Movants say their request, “a temporary stay of just two depositions[,]” is unlikely to prejudice Plaintiffs, who would otherwise be free to obtain discovery from other sources. (Doc. 444-1 at 14–19). This characterization, however, downplays the disruptive effect a stay would have at this stage of the litigation.

First, though Movants say the stay is temporary, their grounds supporting the stay could extend for months or even years. Presently, they request that the depositions be delayed until at least September 8, 2023. (Doc. 444-1 at 7). Movants have chosen this date because it is the first date on which investigations and proceedings conducted by PUCO might resume—after a third six-month stay of those proceedings was recently granted at the request of the government. (Doc. 444-4). It seems unlikely that Movants will feel differently about sitting for depositions in September if the government again requests a lengthy stay of the PUCO proceedings. Indeed, should the government continue to focus its attention on sentencing in the *Householder* case—and probable appeals thereafter—the parties and the Court are likely to find themselves in a situation in September in which little has changed: that is, the government continues to ask for stays in the PUCO proceedings, has yet to move to indict other criminal defendants, and Movants continue to fear indictment for the same reasons they do now. The stay proposed by Movants could stretch out indefinitely. For good reason, indefinite stays are disfavored. *See Newell v. Cty. of Wayne*, No. 12-CV-14928, 2013 WL 4613613, at \*5 (E.D. Mich. Aug. 29,

2013) (finding that an indefinite stay “would be tantamount to a denial of [the plaintiff’s] day in court.”).<sup>27</sup>

As noted by Judge Marbley, the stay proposed could be indefinite. Indefinite stays are not favored. This factor weighs against the U.S. Attorney’s third stay request.

### **3. Interests of the Court and the Public**

Judge Marbley determined that the interests of the court and the public are in the plaintiff’s favor:

‘The convenience of the courts is best served when motions to stay proceedings are discouraged.’ *Mooney by & through Mooney v. Wallace*, No. 04-1190-T-P, 2005 WL 8156550, at \*2 (W.D. Tenn. Apr. 1, 2005) (quoting *Gala Enter., Inc. v. Hewlett Packard Co.*, No. 96 CIV. 4864 DC, 1996 WL 732636, at \*2 (S.D.N.Y. Dec. 20, 1996)). Even more so here—where Movants essentially ask to stay these proceedings indefinitely, and “this matter would languish on the [C]ourt’s docket.” *Id.* Likewise, the public has a strong interest “in expeditious litigation.” *Id.* Because this is a class action, an indefinite stay of this case harms the public interest. *See, e.g., Johnson*, 2020 WL 6479558, at \*3 (recognizing that, because the public had an interest in the alleged claims, a stay would harm their interest).<sup>28</sup>

The interests of the PUCO and the public weigh against granting the U.S. Attorney’s third stay. The public is harmed when important matters (like public corruption) languish on the PUCO’s docket.

Judge Marbley summed up his ruling with the following finding:

In sum, there is substantial overlap between the issues in this case and the criminal investigation surrounding the *Householder* case. And Movants are faced with legitimate concerns regarding the invocation of their Fifth Amendment rights. But the balance of factors cannot support a stay. A stay of these key depositions at this moment—with no clear end in sight—would throw a

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<sup>27</sup> *Id.* at 6-7.

<sup>28</sup> *Id.* at 9.



wrench into the works of discovery and impede or even halt the litigation. It would privilege the interests of Movants above those of Plaintiffs, the public (whose interests are particularly implicated given that this is a class action), and the Court. Accordingly, Movants' Motion for Protective Order (Doc. 444) is **DENIED**.<sup>29</sup>

As noted by Judge Marbley, there should be no privileging the interests of FirstEnergy above the interests of the public. Judge Marbley's findings denying the stay on discovery sought by plaintiffs was reasonable, just and lawful. The PUCO should follow Judge Marbley's ruling and deny the U.S. Attorney's third request for a stay.

Under the six-factor test, the stay should have been denied. The PUCO erred when it granted the request for a stay. The PUCO erred by not re-examining in detail the six-factor test for granting a stay. If it had done so and if it had properly applied the six-factor test, the proper outcome would have been to deny any further extension of the stay.

In the absence of a pending indictment, the interest of consumers in a prompt resolution of these issues outweighs any potential harm to the U.S. Attorney's criminal investigation. That criminal investigation has not resulted in any additional indictments other than the initial ones which were issued over three years ago.

Consumers are being harmed by the ongoing stays. There are various resulting harms. One is that the PUCO has not required FirstEnergy Corp. to preserve all documents and other records until the stay is lifted. While an earlier PUCO order required the FirstEnergy utilities to preserve their records and documents,<sup>30</sup> the PUCO

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<sup>29</sup> *Id.* at 10.

<sup>30</sup> See, *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 ¶ 87 (Aug. 24, 2022).

failed to extend its preservation order to FirstEnergy Corp. FirstEnergy Corp. has produced the bulk of information that OCC has obtained in discovery.

With the delay imposed by the PUCO, parties will have to wait to assert claims against FirstEnergy. During that wait of at least another six months, witnesses and the testimony that was sought through depositions may become unavailable. And over time witnesses' recollections become clouded. In one of the only depositions that went forward prior to the stay, the witness, Ms. Yeboah Amankwah, already was having trouble recollecting even the most basic of details surrounding her employment with FirstEnergy. All told Ms. Yeboah responded that she could not recall 123 times. And that deposition occurred over one year ago.<sup>31</sup>

It is unjust and unreasonable to subject FirstEnergy's consumers to the further risk that witnesses' memories will be degraded, and documentary evidence may be unavailable if the stay is extended. Justice will not only be delayed, but it could very well be denied for FirstEnergy utility consumers.

**ASSIGNMENT OF ERROR NO. 2: The PUCO erred in extending the stay of the proceedings which precludes parties from exercising their right to discovery under Ohio law (R.C. 4903.082) and Ohio Rule (O.A.C. 4901-1-16) Discovery is ongoing in the civil suits against FirstEnergy. Discovery should resume. No further stay should have been granted.**

Under R.C. 4903.082, all parties to a proceeding are granted ample rights of discovery. But with the stay on all facets of the four PUCO investigations, the parties' discovery rights have been abridged. The PUCO found grounds existed to halt discovery and all other matters. This is unlawful in violation of OCC's broad right to discovery under R.C. 4903.082. It is also inconsistent with the broad discovery rights parties are

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<sup>31</sup> See generally, Deposition Transcript of Ebony Yeboah Amankwah (July 21, 2022).

entitled to under O.A.C. 4901-1-16. The PUCO should have terminated the stay and allowed the parties to exercise their broad rights of discovery, as the state and federal courts did in the civil House Bill 6-related litigation which has been allowed to proceed.

**ASSIGNMENT OF ERROR NO. 3: Allowing another six-month stay is unjust and unreasonable because it denies consumers the prompt resolution that consumers should be given.**

The PUCO previously acknowledged that a public interest exists in *prompt* resolution of its investigations into FirstEnergy's misconduct.<sup>32</sup> The PUCO stated:

There is no question that there is a strong public interest in holding responsible individuals involved in criminal misconduct, especially when it involves the public trust, when the facts and law warrant it. The public interest also requires compliance with the laws and regulations under the jurisdiction of the Commission, including ensuring that funds improperly collected from ratepayers are returned to them, if appropriate under the law.<sup>33</sup>

Despite the public interest in a speedy resolution, the PUCO nevertheless approved the stay because “the temporary nature of the stay will not unduly impact the public’s interest in prompt resolution of these matters.”<sup>34</sup> And the PUCO noted that the Auditor in the 2020 Rider DCR audit case (Case No. 20-1629-EL-RDR) recommended refunds be made to consumers and express its “desire to return to customers any dollars due to be refunded as soon as possible.”<sup>35</sup> As history illustrates, a “temporary” six-month stay has now turned into an eighteen-month stay with no end in sight. The longer the delay, the less likely that consumers receiving future refunds will be the same consumers

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<sup>32</sup> Entry at ¶ 79 (Aug. 24, 2022).

<sup>33</sup> *Id.* at ¶ 78.

<sup>34</sup> *Id.* at ¶ 79.

<sup>35</sup> *Id.* at ¶ 80.

whom FirstEnergy actually harmed. And the longer the black cloud remains over the PUCO based on the House Bill 6 scandal.<sup>36</sup>

A more compelling view of what is in the public interest is Judge Adams' ruling denying a stay in a shareholders' derivative suit against FirstEnergy:

[G]iven that it is alleged that FirstEnergy executives perpetrated a scheme that impacted nearly every Ohioan, the Court cannot agree that FirstEnergy's interests are the sole interests that should be taken into account in this matter.

It is not only the trust of FirstEnergy that must be rebuilt. This bribery scheme has undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials. The public has a right to know how it is that the political process was so easily corrupted.<sup>37</sup>

Judge Adams wisely reminds us of the public's strong public interest in knowing the full details of FirstEnergy's bribery scheme. The public heard a great deal about the FirstEnergy bribes to the former speaker of the House that enabled House Bill 6 to go forward during the Householder/Borges criminal trial.

The public, however, has heard less about whether utility consumers paid for the FirstEnergy bribes or other elements of the scandal. And the public has heard little of the role of the former PUCO Chair in the House Bill 6 scandal, as that may have affected past ratemaking and energy policy at the PUCO. The public deserves answers now not years from now. As Judge Adams noted, "[p]roviding the Court and the public with the information learned through discovery will serve to *enhance* the public's trust."<sup>38</sup> The

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<sup>36</sup> <https://www.cleveland.com/open/2021/05/new-puco-chari-jenifer-french-more-transparency-needed-to-lift-the-black-cloud-of-hb6-scandal.html>.

<sup>37</sup> *Miller v. Anderson*, Case No. 5:20-cv-1743, Order at 7-9 (March 22, 2022).

<sup>38</sup> *Id.* at 9.

PUCO's order extending the stay for an additional six months is therefore unjust and unreasonable.

**ASSIGNMENT OF ERROR NO. 4: Granting the stay without the PUCO requiring FirstEnergy Corp. to preserve documents and records as unjust and unreasonable and prejudicial to consumers.**

As part of its earlier stay order, the PUCO ordered the FirstEnergy Utilities to preserve all documents and other records until the stay is lifted.<sup>39</sup> The PUCO should have also imposed this requirement on FirstEnergy Corp. This would have partially helped offset the prejudice that will otherwise occur for parties due to the delay in the discovery process.

Consumers could be prejudiced by a delay in identifying which employees have electronically stored information which may be relevant. This is an ongoing issue in the civil litigation, where the parties are still disputing which employees' records should be reviewed when searching for relevant documents.<sup>40</sup>

The PUCO should have expanded this order to include FirstEnergy Corp. FirstEnergy Corp. has produced the bulk of the information OCC has obtained in discovery. Leaving FirstEnergy Corp. out of the equation may cause substantial prejudice for parties – prejudice that can be avoided if the preservation of records order applies to FirstEnergy Corp.

Applying this order to FirstEnergy Corp. is well within the PUCO's jurisdiction. Under R.C. 4905.05, the PUCO has jurisdiction over public utilities and "to the persons

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<sup>39</sup> Entry at ¶ 87 (Aug. 24, 2022).

<sup>40</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, Joint Discovery Status Report at 11-18 (Sept. 19, 2023).

or companies owning, easing, or operating such public utilities.”<sup>41</sup> Under R.C. 4928.18, the PUCO’s jurisdiction extends to the affiliates of an electric utility.<sup>42</sup>

**ASSIGNMENT OF ERROR NO. 5: Granting the stay without the PUCO also staying FirstEnergy’s Grid Mod I, Grid Mod 2 and ESP V cases was unjust and unreasonable and harmed consumers.**

The PUCO also erred by staying the House Bill 6 investigations without also staying the Grid Mod I, Grid Mod II and ESP V. The PUCO’s omission of a stay for these other proceedings was unjust and unreasonable. Presently, consumers are being denied the fairness of balance and symmetry in regulation. That’s because the PUCO-initiated cases with potential outcomes adverse to FirstEnergy are stayed but cases that FirstEnergy initiated for charging consumers higher rates are ongoing. Staying the pending FirstEnergy proceedings would be fair to FirstEnergy’s two million consumers.

The PUCO stayed the House Bill 6 investigations but has allowed FirstEnergy Utilities to go about business as usual – pushing their applications to collect more and more money from consumers. FirstEnergy’s Grid Mod I and II and FirstEnergy’s ESP V are in the works as though the House Bill 6 scandal has been resolved and has no impact on FirstEnergy consumers’ bills. But this is far from known.

Going forward with other FirstEnergy cases while staying the four FirstEnergy investigations impairs the rights of FirstEnergy’s two million consumers for a fair resolution in three other pending cases (*In re FirstEnergy ESP V, Grid Mod I, and Grid Mod II.*) These cases are inextricably tied to the four House Bill 6 investigation cases.

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<sup>41</sup> R.C. 4905.05.

<sup>42</sup> R.C. 4928.18.

First there is *In re FirstEnergy ESP V*.<sup>43</sup> In that case, FirstEnergy seeks to increase charges to consumers by \$1.4 billion. *That matter is set for hearing on November 7, 2023*.<sup>44</sup> The commonality between the investigation cases and ESP V case is the distribution charges FirstEnergy seeks to collect from consumers during its electric security plan (Rider DCR and Rider AMI). In its fifth electric security plan, FirstEnergy has asked to extend the riders for eight years.

Yet these are the very same riders that the Auditor in one of the PUCO investigation cases (Case No. 20-1629-EL-RDR) found cost misallocations related to House Bill 6. And the cost allocation issues are also a fundamental element of the corporate separation investigation<sup>45</sup> and the political and charitable spending<sup>46</sup> investigation. (For example, the PUCO is investigating the extent to which FirstEnergy collected House Bill 6 costs from consumers in Case No. 20-1502-EL-UNC. The PUCO could decide that House Bill 6 costs include costs that have been capitalized and charged to consumers through numerous riders, including Rider DCR or Rider AMI. In that event, the riders which FirstEnergy seeks to continue through ESP V are way out of whack and cannot possibly be used as a baseline for setting future rider charges to consumers.)

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<sup>43</sup> *In re FirstEnergy ESP V*, Case No. 23-301-EL-SSO.

<sup>44</sup> *In re FirstEnergy ESP V*, Case No. 23-301-EL-SSO, Entry (July 19, 2023).

<sup>45</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.

<sup>46</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.

Next there is FirstEnergy's Grid Mod I case.<sup>47</sup> There FirstEnergy is charging consumers for \$516 million related to its Grid Mod I program which was set in motion through a settlement in FirstEnergy ESP IV.<sup>48</sup> In FirstEnergy's ESP IV, FirstEnergy agreed to file a business plan for grid modernization.<sup>49</sup> As part of the settlement, FirstEnergy agreed that, if the PUCO approved its plan, it would collect charges from consumers through a single-issue ratemaking charge. The PUCO, under the direction of former Chair Randazzo, later approved that single issue ratemaking charge in the tax savings case.<sup>50</sup> Stakeholders deserve to know whether Mr. Randazzo undertook "official action in his capacity as PUCO Chairman to further FirstEnergy Corp.'s interests" in securing approval for the Grid Mod I rider charge to consumers. So, moving forward with Grid Mod I while staying the investigation of Rider DCR is not reasonable. Nor is it protective of consumers.

Finally, there is the Grid Mod II case. In FirstEnergy's Grid Mod II, FirstEnergy is seeking approval to charge consumers for an additional \$626 million grid modernization investment even though it hasn't demonstrated the benefits it promised

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<sup>47</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *In the Matter of the Filing by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company of a Grid Modernization Business Plan*, Case No. 16-481-EL-UNC.

<sup>48</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *In the Matter of the Filing by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company of a Grid Modernization Business Plan*, Case No. 16-481-EL-UNC.

<sup>49</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Third Supplemental Stipulation at 9-10 (Dec. 1, 2015).

<sup>50</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017*, Case No. 18-1604-EL-UNC, Opinion and Order (July 17, 2019).



from Grid Mod I. FirstEnergy's Grid Mod II case is set for hearing on *October 12, 2023*.<sup>51</sup> FirstEnergy's Grid Mod II case is premised on its Grid Mod business plan which relates back to FirstEnergy's ESP IV.

FirstEnergy's ESP IV is the very case that the PUCO ruled should be investigated for a potential violation of R.C. 4928.145 (allowing discovery of side deals).<sup>52</sup> The PUCO found "that there is information in this docket [Case No. 20-1629-EL-RDR] and in the public domain which may demonstrate a potential violation of the Companies obligation to disclose a 'side agreement' during the ESP IV Case."<sup>53</sup> The OCC had conducted the discovery on FirstEnergy that the PUCO referenced. The information the PUCO referred to related to former PUCO Chair Randazzo and a consulting agreement with FirstEnergy that was amended while the ESP IV case was underway. Remedies for consumers for a violation of R.C. 4928.145 will be not only unfairly delayed but also foregone if the PUCO moves forward to approve FirstEnergy's ESP V, potentially mooting out the issue before it is even investigated. That would be wrong.

The PUCO's four House Bill 6 investigations are inextricably interwoven with these three cases. proper account balances and overhead rates will remain unknown. Under these circumstances, it is unjust and unreasonable to continue the stay in the House Bill 6 investigation cases, while allowing the other cases to move forward. In the

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<sup>51</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC, Application at 5 (July 15, 2022); *Id.*, Entry (July 20, 2023).

<sup>52</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 (Dec. 15, 2021).

<sup>53</sup> *Id.* at ¶ 8.

alternative, the PUCO should stay FirstEnergy's ESP V, Grid Mod I and Grid Mod II cases until after the House Bill 6 investigations have concluded.

### III. CONCLUSION

To protect consumers, the PUCO should grant rehearing on OCC's assignments of error and modify or abrogate its Order as described above.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 22<sup>nd</sup> day of September 2023.

/s/ Maureen R. Willis  
Maureen R. Willis  
Acting Legal Director

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

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Summary: App for Rehearing Application for Rehearing by Office of the Ohio  
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