

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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Maureen R. Willis (0020847)  
Ohio Consumers' Counsel

John Finnigan (0018689)  
Counsel of Record  
Thomas J. Brodbeck (0093920)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
65 East State Street, Suite 700  
Columbus, Ohio 43215  
Telephone [Finnigan]: (614) 466-9585  
Telephone [Brodbeck]: (614) 466-9565  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
[thomas.brodbeck@occ.ohio.gov](mailto:thomas.brodbeck@occ.ohio.gov)  
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)  
Counsel of Record  
Emma Y. Easley (0102144)

**Carpenter Lipps LLP**  
280 North High Street, Suite 1300  
Columbus, Ohio 43215  
Telephone: (614) 365-4100  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[easley@carpenterlipps.com](mailto:easley@carpenterlipps.com)  
(willing to accept service by e-mail)

*Counsel for The Ohio Manufacturers'  
Association Energy Group*

March 4, 2024

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On February 26, 2024, the Attorney Examiner resumed the Public Utilities Commission of Ohio's ("PUCO") investigation into corporate separation violations by the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy Utilities"), which, in addition to possibly violating Ohio statutes and rules, might have resulted in FirstEnergy Utilities' consumers paying for nefarious activities related to tainted House Bill 6 ("H.B. 6").<sup>1</sup> While we welcome the resumption, after eighteen months of staying this and the other three H.B. 6 investigations, the PUCO has now gone into hyper-drive. Despite new information becoming known, the February 26, 2024 PUCO Entry fails to re-open the discovery period in this case and afford the parties additional time to conduct discovery and review the documents produced pursuant to the discovery. Additionally, the February

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<sup>1</sup> Entry (Feb. 26, 2024) (attached). The Entry established a procedural schedule and consolidated the two cases.

26, 2024 PUCO Entry established an overly aggressive procedural schedule that will deprive FirstEnergy Utilities' consumers and manufacturers of the fair and reasonable process they are entitled to. A more recent PUCO Entry also precludes oral discovery from key witnesses—former PUCO Chair Samuel Randazzo, and former FirstEnergy executives Chuck Jones and Michael Dowling—occurring in this case (**a ruling that we do not challenge**).<sup>2</sup> However, these rulings together will likely mean that much-needed answers for consumers and manufacturers will remain hidden from the public.

The PUCO's February 26, 2024 Entry fails to give parties the opportunity to issue additional discovery based upon new evidence learned and new documents produced in related matters and fails to allow the parties to cull through the many new documents, transcripts, and evidence that have yet to be produced by FirstEnergy Corp., which was discovery in other cases involving the H.B.6 scandal. Those documents number in the hundreds of thousands (720,000) and were withheld from OCC, OMAEG, and others during the 18-month stay on discovery that the PUCO imposed in the HB 6 investigation cases. While this potential evidence has yet to be produced by FirstEnergy Corp., FirstEnergy Corp. has acknowledged its obligation to do so.

And to make matters worse, the PUCO Entry does not allow for meaningful discovery from the FirstEnergy Utilities, because it does not allow for any additional discovery based on new information which has been revealed during the past 18 months because an earlier ruling closed the discovery period on November 24, 2021.<sup>3</sup>

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<sup>2</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 Nos. 17-974-EL-UNC, et al., Entry (March 1, 2024) at ¶ 7.

<sup>3</sup> Entry (Oct. 12, 2021). In a later Entry, the PUCO extended the procedural schedule but did not extend the discovery deadline. Entry (Feb. 10, 2022).

Consequently, parties would be precluded from receiving the additional documents and/or following up on those documents or the 720,000 pages of new documents or the factual evidence contained in the recent state and federal criminal indictments involving former Chair Randazzo and former FirstEnergy executives that could lead to additional discovery in this case.

Per O.A.C. 4901-1-15(B), OCC and OMAEG ask that this appeal be certified to the PUCO. Upon consideration, the PUCO should reverse or modify the Attorney Examiner's February 26, 2024 ruling and re-open the discovery period in this case and afford the parties additional time to conduct discovery and review the documents produced pursuant to the discovery. That ruling deprives parties of their substantial right to ample discovery under Ohio law (R.C. 4903.082), and their due process guaranteed under the federal and state constitutions. The PUCO should issue a revised procedural schedule which allows for additional discovery to occur, and provides for continuing the evidentiary hearing (and testimony) until *after* the state and federal criminal proceedings have concluded and after all discovery is produced by FirstEnergy Corp. The PUCO should also require FirstEnergy Corp. to expeditiously produce the discovery owed to OCC, OMAEG, and other parties related to pre-existing discovery agreements and/or any additional discovery requests propounded on the FirstEnergy Utilities. This will help to facilitate adequate review of the discovery.

The reasons for granting this Interlocutory Appeal are more fully set forth in the following Request for Certification and Application for Review.

Respectfully submitted,

Maureen R. Willis (0020847)  
Ohio Consumers' Counsel

/s/ John Finnigan

John Finnigan (0018689)  
Counsel of Record  
Thomas J. Brodbeck (0093920)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700  
Columbus, Ohio 43215  
Telephone [Finnigan]: (614) 466-9585  
Telephone [Brodbeck]: (614) 466-9565  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
[thomas.brodbeck@occ.ohio.gov](mailto:thomas.brodbeck@occ.ohio.gov)  
(willing to accept service by e-mail)

/s/ Kimberly W. Bojko

Kimberly W. Bojko (0069402)  
Counsel of Record  
Emma Y. Easley (0102144)

**Carpenter Lipps LLP**

280 North High Street, Suite 1300  
Columbus, Ohio 43215  
Telephone: (614) 365-4100  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[easley@carpenterlipps.com](mailto:easley@carpenterlipps.com)  
(willing to accept service by e-mail)

*Counsel for The Ohio Manufacturers'  
Association Energy Group*

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

This Interlocutory Appeal should be certified to the PUCO because the February 26, 2024 Entry presents a new or novel question of interpretation, law, or policy. The Entry also violates PUCO precedent. An immediate determination is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the PUCO ultimately reverse the ruling in question.

Upon consideration, the PUCO should reverse or modify the Attorney Examiner's February 26, 2024 ruling, which deprives parties of their substantial right to ample discovery under Ohio law (R.C. 4903.082), and their due process guaranteed under the federal and state constitutions. The PUCO should issue a revised procedural schedule which allows for additional discovery to occur, and provides for continuing the evidentiary hearing (and testimony) until *after* the state and federal criminal proceedings have concluded and after all discovery is produced by FirstEnergy Corp. The PUCO should also require FirstEnergy Corp. to expeditiously produce the discovery owed to OCC, OMAEG, and other parties related to pre-existing agreements.

Granting this Interlocutory Appeal would be consistent with Ohio law and rules for discovery and case preparation, as well as PUCO rules and precedent. It will ensure at least a modicum of due process for the parties seeking answers about whether FirstEnergy violated corporate separation requirements. Granting this Interlocutory Appeal would also protect FirstEnergy Utilities' consumers and manufacturers who were, and continue to be, impacted by FirstEnergy's corrupt actions. To use the words so often quoted by the PUCO, granting this Interlocutory Appeal is necessary to "follow the facts wherever they may lead."<sup>4</sup>

## **II. STANDARD OF REVIEW**

The PUCO will review an Attorney Examiner's ruling if the Attorney Examiner (or other authorized PUCO personnel) certifies the appeal.<sup>5</sup> The standard applicable to certifying an appeal is that "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question."<sup>6</sup> Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.<sup>7</sup>

Here, the Attorney Examiner should certify this Interlocutory Appeal because it fully satisfies this test. The appeal presents a new or novel question of law, it represents a

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<sup>4</sup> PUCO News Release, *PUCO to lift stay on FirstEnergy/HB 6 investigations*, (Feb. 21, 2024), available at: <https://puco.ohio.gov/news/puco-to-lift-stay-on-firstenergy-hb6-investigations>; Entry at 2.

<sup>5</sup> O.A.C. 4901-1-15(B).

<sup>6</sup> *Id.*

<sup>7</sup> O.A.C. 4901-1-15(E).



departure from past precedent, and an immediate determination is needed to prevent undue prejudice to the parties.

### **III. REQUEST FOR CERTIFICATION**

#### **A. The Attorney Examiner’s ruling presents a new or novel question of interpretation, law or policy.**

The February 26, 2024 Entry issued by the Attorney Examiner that lifts a lengthy stay where pertinent documents have been released to the public without extending the discovery period, when coupled with a more recent PUCO Entry that precludes even oral discovery from and testimony by key witnesses, presents a new or novel question of interpretation, law, or policy. Therefore, the February 26, 2024 Entry meets the standard for certification.

Three days after the Attorney Examiner issued the Entry that OCC and OMAEG now appeal, the Ohio Attorney General filed a letter requesting that the PUCO “refrain from enforcing any subpoena requiring Samuel Randazzo, Charles Jones, or Michael Dowling to produce documents or testify in any PUCO hearing while criminal proceedings are pending.”<sup>8</sup> The Ohio Attorney General alerted the PUCO that moving forward with oral and written discovery against the criminally indicted individuals could interfere with the state’s criminal case.

OCC and OMAEG respect and have confidence in the Ohio Attorney General’s assessment of Ohio law in this regard and appreciate the concern. The last thing that parties in the PUCO investigation want to do is interfere with the federal and state

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<sup>8</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, Correspondence received from Carol Hamilton O’Brien, Deputy Attorney General for Law Enforcement (Feb. 29, 2024).

criminal cases that are now underway and involve the former PUCO Chair and/or former FirstEnergy executives. We agree that “avoiding interference with the ongoing federal criminal investigation by the U.S. Attorney or the civil action brought by the Ohio Attorney General Dave Yost is of the utmost importance.”<sup>9</sup>

The Ohio Attorney General’s letter was a game changer and certainly presents a new and novel question for the PUCO—How do you ensure parties full and complete discovery rights they are guaranteed under the constitution and law and yet shut down discovery on key witnesses? The PUCO’s Entry that we are appealing today was issued before the letter from the Ohio Attorney General. That letter completely changes the whole complexion of this proceeding.

We do not intend to jeopardize the criminal cases brought by either the state or the federal government. But, assuming that the discovery cut-off remains intact, holding an evidentiary hearing without being allowed to conduct even oral discovery or receive testimony from key witnesses is highly prejudicial to parties and virtually guarantees that FirstEnergy Utilities’ consumers and manufacturers will not get the answers they deserve.

While precluding discovery or testimony of former FirstEnergy executives and former PUCO chair is understandable and warranted and we do not oppose any PUCO rulings in that regard, the procedural schedule in this case should be continued to allow for additional discovery and to allow the state and federal criminal cases to be concluded. The case should also be continued until all discovery is produced by FirstEnergy Corp. Otherwise, parties will be forced to move forward without the much-needed information

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<sup>9</sup> *Id.*, Entry at 29 (Aug. 24, 2022).

likely to be produced through discovery (either written or oral) of the former FirstEnergy executives and the former PUCO Chair.

Here are just a few examples highlighting where additional discovery is needed:

- The FirstEnergy Deferred Prosecution Agreement states that FirstEnergy paid Randazzo \$4.3 million to further nuclear bailout legislation (*i.e.*, H.B. 6) and other FirstEnergy legislative and regulatory priorities.<sup>10</sup> The nuclear bailout legislation benefited FirstEnergy's merchant power and marketing business (FirstEnergy Solutions), so this would be a corporate separation violation. Randazzo, Jones and Dowling were the ones who entered into and carried out this agreement, so their testimony is needed to prove this corporate separation violation.
- Former Speaker Larry Householder was convicted for accepting bribes from FirstEnergy to enact H.B. 6. The bribery payments were funneled through Generation Now, Hardworking Ohioans and Partners for Progress, three 501(c)(4) dark money groups. This was a corporate separation violation because some of the dark money payments were charged to FirstEnergy Utilities' consumers and manufacturers.<sup>11</sup> Jones and Dowling were the ones who entered into and carried out this agreement (along with Householder), so their testimony is needed to prove this corporate separation violation. (Note that OCC and OMAEG would not be able to prove it through Householder's testimony because he may be unavailable.)
- FirstEnergy produced emails between Jones and FirstEnergy executive Dennis Chack.<sup>12</sup> The emails show that Jones asked Randazzo to help FirstEnergy Advisors (a competitive business affiliated with the FirstEnergy Utilities) obtain a license as a power broker/aggregator.<sup>13</sup> This would be a corporate separation violation because this benefited FirstEnergy's competitive business. The testimony of Randazzo and Jones is needed to prove this corporate separation violation.

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<sup>10</sup> *United States v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 35 (July 22, 2021).

<sup>11</sup> *See 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, Audit Report, Expanded Scope at 4-5 and Table 7 at 13.

<sup>12</sup> *In the Matter of the Application of Suvon, LLC d/b/a FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Motion to Withdraw Certification Application, Exhibit A (Nov. 2, 2021).

<sup>13</sup> *Id.*

As we stated earlier and concede, even assuming that the discovery cut-off remains intact, oral discovery of the former FirstEnergy executives and the former PUCO Chair cannot move forward, given the matters raised by the Ohio Attorney General. As a result of this game-changing information, the likes of which have not been seen before in a PUCO proceeding, the PUCO should not move forward with hearing and testimony. That would amount to ignoring highly relevant evidence that could be provided through future discovery on the former FirstEnergy executives and the former PUCO Chair.

The criteria in O.A.C. 4901-1-15(B) are met because the Attorney Examiner's February 26, 2024 Entry presents a new or novel question of interpretation, law, or policy. Therefore, the appeal should be certified.

**B. The Attorney Examiner's ruling is a departure from PUCO precedent.**

This appeal should be also certified per O.A.C. 4901-1-15(B) because the Entry violates PUCO precedent in several respects.

Under the February 26, 2024 Entry, the PUCO has, in effect, adhered to its earlier decision that the discovery cut-off of November 24, 2021 should continue.<sup>14</sup> That is unjust and unreasonable and not in customers' best interest. During the eighteen months that the FirstEnergy H.B. 6 investigations were placed on hold, many significant events and revelations occurred. For example, a criminal indictment was issued by the U.S. Government against the former PUCO Chair Randazzo, and state criminal indictments were issued by the Ohio Attorney General against former PUCO Chair Randazzo and

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<sup>14</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 the Ohio Adm.Code 4901:1-37*, Entry (Oct. 12, 2021). In a later Entry, the PUCO extended the procedural schedule but did not extend the discovery deadline. Entry (Feb. 10, 2022).

former FirstEnergy executives Jones and Dowling. Yet despite the significant amount of evidence contained in these indictments that may be germane to this investigation, the PUCO has effectively denied parties the opportunity to meaningfully address it. The PUCO failed to follow its well-established precedent (law and rules) that allows parties' ample discovery rights—rights that extend to newly discovered evidence not previously known or available.<sup>15</sup>

Another way the PUCO Entry violates precedent is that the Entry maintains the same limited scope of the audit,<sup>16</sup> despite all the developments associated with the criminal federal and state indictments. This again violates PUCO precedent that the PUCO should consider all relevant evidence, including newly discovered evidence. Otherwise, the PUCO's decision may, even upon issuance, be based on out-of-date information.<sup>17</sup> The importance of expanding the scope of an audit when new information becomes available was demonstrated in the related H.B. 6 investigation case auditing the charges passed on to customers through the FirstEnergy Utilities' Delivery Capital Recovery Rider. The scope of the 2020 DCR audit was expanded *three times* in response to new information being released to the public.<sup>18</sup>

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<sup>15</sup> O.A.C. 4906-2-31(B).

<sup>16</sup> Entry, Request for Proposals at 1-2 (Nov. 4, 2020). On Nov. 5, 2021, OCC and NOPEC filed a Motion for Supplemental Audit, but the PUCO deferred ruling until the evidentiary hearing. *See* Prehearing Conference, Tr. at 24 (Jan. 4, 2022).

<sup>17</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 (Feb. 10, 2022).

<sup>18</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 (March 10, 2021), Entry (Sept. 29, 2021), Entry (December 15, 2021).

The Entry also is contrary to PUCO practice because, by maintaining the discovery cut-off established earlier, parties are deprived of the right to conduct additional discovery based on changed events. OCC and OMAEG expect to receive a large volume of documents and deposition transcripts (about 720,000 pages), from the federal securities litigation arising from H.B. 6. The Attorney Examiner's Entry, however, made no meaningful accommodation to allow OCC and OMAEG time to review the new information or incorporate the information into their pre-filed testimony. Therefore, the Entry is a departure from precedent. In other cases where significant new information is presented, such as cases involving a partial settlement agreement, the PUCO typically allows meaningful time after the new information is presented for the parties to conduct discovery and address the new information in testimony.<sup>19</sup>

The criteria in O.A.C. 4901-1-15(B) are met because, for these reasons, the ruling a departure from past precedent. Therefore, this appeal should be certified.

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

This appeal should be certified to the PUCO because an "immediate determination" by the PUCO is needed to prevent undue prejudice<sup>20</sup> to OCC, OMAEG, Ohio consumers and manufacturers, and the public at large. OCC and OMAEG need the evidentiary hearing continued until they are free to obtain both oral and written discovery directly from former Chair Randazzo, and former executives Jones and Dowling, without interfering with the criminal cases.

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<sup>19</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, Entry (May 9, 2018).

<sup>20</sup> O.A.C. 4901-1-15(B).

Apart from the issue raised by the Ohio Attorney General, OCC and OMAEG require additional time to receive and review 720,000 pages of additional documents that FirstEnergy Corp. has agreed to produce.

Undue prejudice would occur without an immediate determination of these matters. That is because even if the PUCO ultimately reverses the Attorney Examiner's rulings after this matter has moved forward for hearing and ultimate resolution, it cannot be undone. OCC, OMAEG and other interested parties will have suffered the denial of (1) their ample discovery rights under R.C. 4903.082 and O.A.C. 4901-1-16 *et seq.*; and (2) they will not have been provided sufficient time to receive and review discovery, and prepare testimony as explained above. This amounts to a denial of due process rights, guaranteed by the federal and Ohio constitutions.

#### **IV. APPLICATION FOR REVIEW**

Regarding the corporate separation violation(s), the FirstEnergy Deferred Prosecution Agreement states that FirstEnergy paid Randazzo \$4.3 million to further nuclear bailout legislation (*i.e.*, H.B. 6) and other FirstEnergy legislative and regulatory priorities.<sup>21</sup> The nuclear bailout legislation benefited FirstEnergy's merchant power and marketing business (FirstEnergy Solutions), so this would be a likely corporate separation violation. Randazzo, Jones and Dowling were the ones who entered into and carried out this agreement. We are left with a path that should lead to answers. But that path is blocked under the Attorney Examiner's ruling.

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<sup>21</sup> *United States v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 35 (July 22, 2021).

The PUCO’s February 26, 2024 Entry will deprive FirstEnergy Utilities’ consumers of the fair and reasonable process they are entitled to. When coupled with a more recent PUCO Entry that precludes oral discovery of information and evidentiary hearing testimony from key witnesses—former PUCO Chair Samuel Randazzo, and former FirstEnergy—the PUCO’s February 26, 2024 Entry will deprive the FirstEnergy Utilities’ consumers and manufacturers of the fair and reasonable process they are entitled to and will ensure that the much-needed answers to consumers and manufacturers will remain hidden from the public. Even assuming that the discovery cut-off remains intact, without oral discovery or testimony from the former FirstEnergy executives and former PUCO Chair, we may never know the full truth about the vendor payments that consumers paid, including the \$4.3 million payment to former PUCO Chair Randazzo. Randazzo, Jones, and Dowling were the ones who entered into and carried out the agreement for these payments, so discovery is crucial to fully and fairly investigate the matter.

Bribery payments to former Speaker Householder funneled through Generation Now and Hardworking Ohioans were noted by the auditor in the 2020 DCR charge case as being charged through the DCR charge<sup>22</sup> and unsupported.<sup>23</sup> This cost misallocation is also a potential corporate separation violation. Jones and Dowling were the ones who entered into and carried out this agreement (along with Householder), so discovery is needed to fully and fairly investigate the matter.

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<sup>22</sup> See, e.g., *id.* at 9.

<sup>23</sup> See, e.g., *id.* at 13.



The PUCO's February 26, 2024 Entry fails to allow parties to conduct additional discovery in light of the information that has become known during the period of the stay, it fails to afford parties the right to conduct oral discovery of key witnesses, and if additional discovery is allowed, it prohibits the review of the hundreds of thousands of new documents, transcripts, and evidence that will be produced by FirstEnergy Corp., which was discovery in other cases involving the H.B.6 scandal. The PUCO Entry also fails to provide for any additional time period for seeking discovery from FirstEnergy Utilities. This means parties cannot rely upon the 720,000 pages of new documents that will be produced by FirstEnergy Corp., or the factual evidence contained in the recent state and federal criminal indictments involving former Chair Randazzo and former FirstEnergy executives.

The PUCO should issue a revised procedural schedule that extends the discovery cut-off date and provides for the evidentiary hearing to occur *after* the state and federal criminal proceedings have concluded and after all discovery is produced by FirstEnergy Corp. In addition, the PUCO should require FirstEnergy Corp. to expeditiously produce the discovery owed to OCC, OMAEG, and other parties related to pre-existing agreements to facilitate adequate review of the discovery prior to any resumption of this investigation.

**A. The Entry establishing a deadline for pre-filed testimony and an evidentiary hearing date is unreasonable and unlawful because it fails to provide OCC and OMAEG adequate time for discovery.**

On September 24, 2021, OCC filed a motion for subpoena to FirstEnergy Corp. requiring it to produce copies of the documents and deposition transcripts from the

federal securities litigation.<sup>24</sup> On or about October 8, 2021, OCC and FirstEnergy Corp. reached agreement for FirstEnergy Corp. to produce this information to OCC. To date, FirstEnergy Corp. has produced 561,173 pages of documents and one partial deposition transcript.

FirstEnergy Corp. produced these documents in 25 separate batches, over a period of ten months, as follows:

**Table 1 – FirstEnergy Corp. Document Production Dates**

<b><u>Batch No.</u></b>	<b><u>Date</u></b>
1	10/29/21
2,3	11/6/21
4,5	11/16/21
6	12/8/21
7,8	2/15/22
9,10	2/18/22
11	4/11/22
12	5/24/22
13	6/13/22
15	N/A
16-25	8/12/22

FirstEnergy Corp. stopped producing these documents and deposition transcripts to OCC when the litigation stay was ordered by the PUCO. The PUCO ruled that such production should cease, despite OCC asking for the production to continue during the

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<sup>24</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, OCC Motion for Subpoena Duces Tecum for FirstEnergy Corp. to Produce All Discovery Documents That FirstEnergy Corp. was Ordered to Provide by the U.S. Chief District Judge in a Shareholder Lawsuit (Sept. 24, 2021).

stay.<sup>25</sup> FirstEnergy Corp. nevertheless kept producing documents to the plaintiffs in the federal securities litigation and apparently participated in numerous depositions. As of July 26, 2023, FirstEnergy Corp. had produced over 750,000 pages of documents to the plaintiffs in the federal securities case and the plaintiffs had taken or noticed the depositions of 48 fact witnesses.<sup>26</sup>

Earlier in this case, OCC requested an extension of the procedural schedule based on a need for additional time to review the information produced by FirstEnergy Corp. In granting OCC's request, the Attorney Examiners noted:

The attorney examiners are mindful of the substantial production of over 230,000 pages of documents by FirstEnergy Corp. in response to the broad subpoena issued by the attorney examiner at the request of OCC. The attorney examiners would have taken the document production into consideration at the prehearing conference on January 7, 2022, if OCC and NOPEC had raised an objection to the proposed date for the hearing or suggested a different hearing date.<sup>27</sup>

OCC and OMAEG are entitled to copies of the documents and deposition transcripts from the civil litigation. Also as noted above, it took FirstEnergy Corp. about eight months to produce documents to OCC prior to the stay. Given FirstEnergy Corp.'s slow responses to the parties' discovery requests, the procedural order in the present case should have left open the deadline for filing testimony and the evidentiary hearing date

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<sup>25</sup> See *id.* at OCC's Application for Rehearing (Sept. 22, 2023) at Assignments of Error 1 and 2.

<sup>26</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, FirstEnergy's Memorandum of Law in Opposition to Motion to Compel Discovery of FirstEnergy's "Internal Investigation" at 10 (S.D. Ohio) (July 26, 2023).

<sup>27</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 ¶ 30 (Feb. 10, 2022).

until FirstEnergy produces the requested information and until OCC and OMAEG have an adequate opportunity to review the information.

The Entry's failure to do so was unreasonable and unlawful because it deprives OCC and OMAEG of their discovery rights under Ohio law<sup>28</sup> and denies them due process guaranteed under the federal and state constitutions.<sup>29</sup> R.C. 4903.082 states that "[a]ll parties and intervenors shall be granted ample rights of discovery."<sup>30</sup> Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed "full and reasonable discovery" under its rules. The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases. Further, the Ohio Supreme Court has explained that "[d]ue process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a *meaningful* time and in a *meaningful* manner . . . ."<sup>31</sup> If the Entry stands, there is no meaningful opportunity to be heard on these matters.

The Entry is unreasonable and unlawful. The PUCO should therefore reverse or modify the Entry as proposed herein.

**B. The February 26, 2024 Entry unduly prejudiced OCC and OMAEG by failing to extend the discovery deadline.**

The Entry also violated PUCO precedent and unduly prejudiced OCC and OMAEG by failing to extend the deadline for discovery.

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<sup>28</sup> R.C. 4903.082.

<sup>29</sup> U.S. Const., Amends. V and XIV; Ohio Const., Art. I, sec. 16.

<sup>30</sup> See *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789

<sup>31</sup> *State v. Hochhausler*, 76 Ohio St.3d 455, 459 (1996) (italics added, citations omitted).

In a September 17, 2021 Entry, the PUCO set the “deadline for the service of discovery, except for notices of deposition,” on November 1, 2021.<sup>32</sup> This was part of a now outdated procedural schedule which had provided for an evidentiary hearing on January 4, 2022.<sup>33</sup> On October 12, 2021, the PUCO entered a new Entry with a new evidentiary hearing of February 10, 2022.<sup>34</sup> In that entry, the PUCO set the “deadline for the service of discovery, except for notices of deposition” on November 24, 2021.<sup>35</sup> Then, a February 10, 2022 Entry extended the hearing date to May 9, 2022.<sup>36</sup> But, in perhaps an oversight, the Entry did not provide a corresponding extension of the discovery cut-off date.<sup>37</sup> Based on the foregoing, the deadline for written discovery expired on November 24, 2021 even though the evidentiary hearing will not occur until mid-2024 or later.

R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.”<sup>38</sup> Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules. Further, the Supreme Court of Ohio has explained that “[d]ue process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a *meaningful* time and in a *meaningful* manner . . .”<sup>39</sup>

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<sup>32</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 (Sept. 17, 2021).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, Entry (Oct. 12, 2021).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, Entry (Feb. 10, 2022).

<sup>37</sup> *Id.*

<sup>38</sup> *See OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789.

<sup>39</sup> *State v. Hochhausler*, 76 Ohio St.3d 455, 459 (1996) (italics added, citations omitted).

In light of these statutory and constitutional protections, when significant new information is presented in other cases, such as the filing of a partial settlement agreement, the PUCO typically allows meaningful time after the new information is presented to conduct discovery (even if the discovery cut-off date had passed) and address the new information in testimony.<sup>40</sup> Otherwise parties' discovery rights will be completely abridged, contrary to Ohio law<sup>41</sup> and due process rights guaranteed under federal and Ohio constitutions.<sup>42</sup>

Here, the Entry's failure to extend the earlier deadline for written discovery does *not* provide for ample, full and reasonable, or meaningful discovery *even though*, as described herein, significant new information has come to light.

The Entry is unreasonable and unlawful. The PUCO should therefore reverse or modify the Entry.

## **V. CONCLUSION**

The Interlocutory Appeal should be certified to the PUCO Commissioners as it meets the standards for such an appeal under O.A.C. 4901-1-15(B). The Entry presents a new or novel question of interpretation, law, or policy. The Attorney Examiner's Entry unreasonably precludes additional discovery, which will preclude OCC and OMAEG's *ample* discovery rights and due process rights under the current, compressed procedural schedule issued by the Attorney Examiner.

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<sup>40</sup> See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, Entry (May 9, 2018).

<sup>41</sup> R.C. 4903.082.

<sup>42</sup> U.S. Const., Amends. V and XIV; Ohio Const., Art. I, sec. 16.

The PUCO should issue a revised procedural schedule which extends the discovery cut-off date and provides for continuation of the evidentiary hearing (and testimony) until *after* the state and federal criminal proceedings have concluded and after all discovery is produced by FirstEnergy Corp. The PUCO should also require FirstEnergy Corp. to expeditiously produce the discovery owed to OCC, OMAEG, and other parties related to pre-existing agreements.

Respectfully submitted,

Maureen R. Willis (0020847)  
Ohio Consumers' Counsel

/s/ John Finnigan  
John Finnigan (0018689)  
Counsel of Record  
Thomas J. Brodbeck (0093920)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
65 East State Street, Suite 700  
Columbus, Ohio 43215  
Telephone [Finnigan]: (614) 466-9585  
Telephone [Brodbeck]: (614) 466-9565  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
[thomas.brodbeck@occ.ohio.gov](mailto:thomas.brodbeck@occ.ohio.gov)  
(willing to accept service by e-mail)

/s/ Kimberly W. Bojko  
Kimberly W. Bojko (0069402)  
Counsel of Record  
Emma Y. Easley (0102144)

**Carpenter Lipps LLP**  
280 North High Street, Suite 1300  
Columbus, Ohio 43215  
Telephone: (614) 365-4100  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[easley@carpenterlipps.com](mailto:easley@carpenterlipps.com)  
(willing to accept service by e-mail)

*Counsel for The Ohio Manufacturers'  
Association Energy Group*

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review was served on the persons stated below via electric transmission this 4<sup>th</sup> day of March 2024.

/s/ John Finnigan

John Finnigan

Assistant Consumers' Counsel

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

### **SERVICE LIST**

[thomas.lindgren@ohioAGO.gov](mailto:thomas.lindgren@ohioAGO.gov)  
[werner.margard@ohioAGO.gov](mailto:werner.margard@ohioAGO.gov)  
[joliker@igsenergy.com](mailto:joliker@igsenergy.com)  
[Mnugent@igsenergy.com](mailto:Mnugent@igsenergy.com)  
[bethany.allen@igs.com](mailto:bethany.allen@igs.com)  
[evan.betterton@igs.com](mailto:evan.betterton@igs.com)  
[gkrassen@bricker.com](mailto:gkrassen@bricker.com)  
[dstinson@bricker.com](mailto:dstinson@bricker.com)  
[whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  
[trent@hubaydougherty.com](mailto:trent@hubaydougherty.com)  
[mwise@mcdonaldhopkins.com](mailto:mwise@mcdonaldhopkins.com)  
[mkurtz@BKLlawfirm.com](mailto:mkurtz@BKLlawfirm.com)  
[kboehm@BKLlawfirm.com](mailto:kboehm@BKLlawfirm.com)  
[jkylercohn@BKLlawfirm.com](mailto:jkylercohn@BKLlawfirm.com)  
[tallexander@beneschlaw.com](mailto:tallexander@beneschlaw.com)  
[khehmeyer@beneschlaw.com](mailto:khehmeyer@beneschlaw.com)

Attorney Examiners:

[megan.addison@puco.ohio.gov](mailto:megan.addison@puco.ohio.gov)  
[jacqueline.st.john@puco.ohio.gov](mailto:jacqueline.st.john@puco.ohio.gov)

[edanford@firstenergycorp.com](mailto:edanford@firstenergycorp.com)  
[cwatchorn@firstenergycorp.com](mailto:cwatchorn@firstenergycorp.com)  
[bknipe@firstenergycorp.com](mailto:bknipe@firstenergycorp.com)  
[HConger@jenner.com](mailto:HConger@jenner.com)  
[marcie.lape@skadden.com](mailto:marcie.lape@skadden.com)  
[iavalon@taftlaw.com](mailto:iavalon@taftlaw.com)  
[kverhalen@taftlaw.com](mailto:kverhalen@taftlaw.com)  
[rdove@keglerbrown.com](mailto:rdove@keglerbrown.com)  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[tdougherty@theOEC.org](mailto:tdougherty@theOEC.org)  
[ctavenor@theOEC.org](mailto:ctavenor@theOEC.org)  
[knordstrom@theoec.org](mailto:knordstrom@theoec.org)  
[jweber@elpc.org](mailto:jweber@elpc.org)  
[trhayslaw@gmail.com](mailto:trhayslaw@gmail.com)  
[leslie.kovacik@toledo.oh.gov](mailto:leslie.kovacik@toledo.oh.gov)  
[dparram@brickergraydon.com](mailto:dparram@brickergraydon.com)  
[dborchers@brickergraydon.com](mailto:dborchers@brickergraydon.com)  
[rmains@brickergraydon.com](mailto:rmains@brickergraydon.com)



## THE PUBLIC UTILITIES COMMISSION OF OHIO

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

Entered in the Journal on February 26, 2024

#### I. SUMMARY

{¶ 1} In this Entry, the attorney examiner sets a procedural schedule, as directed by the Commission.

#### II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities, as defined by R.C. 4928.01(A)(6), and public utilities, as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} The Commission issued an Entry on February 21, 2024, lifting the then-existing stay and instructing the attorney examiners to issue procedural schedules in Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, and 20-1629-EL-RDR (collectively, the *FirstEnergy Investigation Cases*).

{¶ 4} Pursuant to the Commission's Entry issued in the *FirstEnergy Investigation Cases* on February 21, 2024, the attorney examiner observes that the stay has been lifted in the above-captioned proceeding and this case may now proceed. As such, the attorney examiner sets the following procedural schedule:

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-2-

- a. A procedural/prehearing conference shall be scheduled for April 25, 2024, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio.
- b. Testimony on behalf of the Companies is due by June 26, 2024
- c. Testimony on behalf of intervenors is due by July 2, 2024.
- d. A procedural/prehearing conference shall be scheduled for July 9, 2024, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio.
- e. The evidentiary hearing shall commence on July 22, 2024, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio.

{¶ 5} Additional procedural conferences may be scheduled if the attorney examiner deems them necessary.

### III. ORDER

{¶ 6} It is, therefore,

{¶ 7} ORDERED, That the procedural schedule be set in accordance with Paragraph 4. It is, further,

{¶ 8} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Jacky Werman St. John

By: Jacky Werman St. John  
Attorney Examiner

MJA/dmh

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**Case No(s). 17-0974-EL-UNC**

Summary: Attorney Examiner Entry that a procedural/prehearing conference shall be scheduled for April 25, 2024, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio; testimony on behalf of the Companies is due by June 26, 2024; a procedural/prehearing conference shall be scheduled for July 9, 2024, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio; and the evidentiary hearing shall commence on July 22, 2024, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio electronically filed by Ms. Donielle M. Hunter on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio.

**This foregoing document was electronically filed with the Public Utilities  
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**in**

**Case No(s). 17-0974-EL-UNC**

Summary: Application Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review by Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group electronically filed by Alana M. Noward on behalf of Finnigan, John.