**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA FIRSTENERGY’S MOTION TO STRIKE OCC’S DIRECT TESTIMONY**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# I. INTRODUCTION

On September 20, 2024, OCC filed the testimony of its expert witness, Joseph Buckley. Mr. Buckley has recommended a $53 million forfeiture for numerous corporate separation violations by the FirstEnergy Utilities. Mr. Buckley also recommended that, in the current rate case (24-468-EL-AIR), the PUCO should reduce the allowed return on equity by 50 basis points.[[1]](#footnote-2)

Mr. Buckley’s testimony includes a discussion of past OCC recommendations on corporate separation and how if those recommendations would have been adopted it might have prevented the H.B. 6 scandal.[[2]](#footnote-3) Mr. Buckley also describes factually the criminal complaint and OCC’s actions to investigate FirstEnergy’s involvement in H.B. 6.[[3]](#footnote-4) Mr. Buckley also discusses some of FERC’s audit findings associated with its audit of FirstEnergy Corp.[[4]](#footnote-5) And Mr. Buckley also includes an attachment, JPB-4, demonstrating how the scope of this case was unreasonably narrowed. The FirstEnergy Utilities filed a motion seeking to strike these parts of Mr. Buckley’s testimony. That motion should be denied.

The FirstEnergy Utilities contend that the testimony it seeks to exclude is “outside the defined scope of the hearing[.]”[[5]](#footnote-6) They rely on the June 21, 2024 Entry that “allegations involving FirstEnergy’s activities related to the passage of Am. Sub. H.B. 6 and the former Commission chairman will be addressed at a later time.”[[6]](#footnote-7) The PUCO’s ruling, kicking the can down the road, was the opposite of what is needed for consumers who are seeking answers. And it will not aid in dispelling the black cloud that remains over the PUCO[[7]](#footnote-8) concerning its involvement in the H.B. 6 scandal that has been called by the former U.S Attorney the “largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio.”[[8]](#footnote-9)

Regardless, OCC’s testimony doesn’t concern “allegations” involving H.B. 6 activities that the Attorney Examiner ruled are beyond the scope of this proceeding. Instead, Mr. Buckley provides undisputed facts.

We are struck by the fact that the FirstEnergy Utilities’ posture in this case seems to be hide the ball rather than learn from its past mistakes. Contrast that with numerous public statements about how FirstEnergy is turning over a new leaf, post H.B. 6. In July 2021, FirstEnergy released a statement saying that its “core values and behaviors include integrity, openness, and trust.”[[9]](#footnote-10) FirstEnergy has said that “as an organization, we are redoubling our commitment to live up to these values and the standards that we know our stakeholders expect of us” and “moving forward, we are intently focused on fostering a strong culture of compliance and ethics.”[[10]](#footnote-11) In December 2022, touting a purported commitment to these values, FirstEnergy admitted to past violations of FERC’s “duty of candor” when it failed to disclose spending on lobbyists. FirstEnergy’s public persona fails to live up to reality. FirstEnergy’s motion to strike should be denied.

# II. ARGUMENT

The FirstEnergy Utilities misconstrue the PUCO’s June 21st Entry and OCC witness Joseph Buckley’s testimony. According to FirstEnergy, Mr. Buckley’s testimony is outside the scope of the hearing because it discusses H.B. 6.[[11]](#footnote-12) In the June 21st Entry, the PUCO states that this proceeding’s scope does not include “**allegations** involving FirstEnergy’s activities related to the passage of Am. Sub. H.B. 6 and the former Commission chairman.”[[12]](#footnote-13)

While the Entry limits “allegations,” it *does not* exclude a factual history of what has occurred in this proceeding and in Ohio regarding H.B. 6 to provide context.[[13]](#footnote-14) And it does not preclude expert witness testimony that draws conclusions about what lessons we have learned from going through the H.B. 6 scandal.[[14]](#footnote-15) Regarding the latter (OCC recommendations in the 2012 Investigation Case may have prevented the H.B. 6 scandal), Mr. Buckley as a regulatory expert simply laid out the fact (OCC made recommendations) and reached a conclusion (OCC’s recommendations may have prevented the H.B. 6 scandal). That’s exactly what experts are permitted to do.[[15]](#footnote-16) Yet the FirstEnergy Utilities are attempting to strike from OCC’s testimony context, facts, and admissions of wrongdoing. That is wrong.[[16]](#footnote-17)

The FirstEnergy Utilities contend that Mr. Buckley’s “testimony includes substantial discussion and argument related to H.B.6.”[[17]](#footnote-18) To be clear, Mr. Buckley provides a factual history of what has occurred for context. What the FirstEnergy Utilities seek to strike from Mr. Buckley’s testimony also includes the background of the current investigation and the history of this proceeding.[[18]](#footnote-19) The June 21st Entry does not preclude such testimony. The facts and background of H.B. 6 do matter, especially when we are discussing corporate separation violations and the resulting harm to consumers for those violations.

The testimony that the FirstEnergy Utilities seek to strike provides background and context to Mr. Buckley’s testimony and to this proceeding. The FirstEnergy Utilities will have the opportunity to cross-examine Mr. Buckley regarding his testimony. The testimony should stand.

# III. CONCLUSION

OCC witness Buckley’s testimony does not contravene the PUCO’s June 21st Entry. His testimony is not about “allegations” involving activities related to the passage of Am. Sub. H.B. 6 and the former Commission chairman.[[19]](#footnote-20) Instead, the testimony of Mr. Buckley that the FirstEnergy Utilities seek to strike focuses on facts. His testimony provides much needed context to the corporate separation issues before the PUCO in this case. The PUCO should deny the FirstEnergy Utilities’ motion to strike.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra FirstEnergy’s Motion to Strike OCC’s Direct Testimony was served via electronic transmission upon the parties this 3rd day of October 2024.

*/s/ William J. Michael*

William J. Michael

Assistant Consumers’ Counsel

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

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1. Direct Testimony of Joseph P. Buckley (Sept. 20, 2024) at 27. [↑](#footnote-ref-2)
2. *Id.* at 11-12, Question and Answer 16. [↑](#footnote-ref-3)
3. *Id.* at p. 12-14. [↑](#footnote-ref-4)
4. *Id.* at p. 21, lines13-18, footnote 9. [↑](#footnote-ref-5)
5. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Motion to Strike Specific Intervenor Pre-Filed Direct Testimony (Sept. 26, 2024) at 2-3. [↑](#footnote-ref-6)
6. *Id.* at 2. [↑](#footnote-ref-7)
7. “New PUCO Chair Jennifer French: more transparency needed to lift the ‘black cloud’ of HB6 scandal,” Cleveland.com (May 18, 2021). [↑](#footnote-ref-8)
8. Armus, Teo (22 July 2020), [“GOP Ohio House speaker arrested in connection to $60 million bribery scheme,”](https://www.washingtonpost.com/nation/2020/07/22/ohio-house-speaker-arrested-republican/) *The Washington Post*. [↑](#footnote-ref-9)
9. FirstEnergy Reaches Agreement to Resolve Department of Justice Investigation (<https://www.firstenergycorp.com/fehome.html>). [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. Motion to Strike at 3. [↑](#footnote-ref-12)
12. Case No. 17-974-EL-UNC, Entry (June 21, 2024) at ¶ 55 (“June Entry”) (emphasis added). [↑](#footnote-ref-13)
13. Buckley Testimony at 12:14- 14:14; 21:13-18 (including footnote 9), Attachment JPB-4. [↑](#footnote-ref-14)
14. *Id.* at 11:19-12:5. [↑](#footnote-ref-15)
15. Ohio Ev. R. 703. [↑](#footnote-ref-16)
16. FirstEnergy has also moved to strike testimony of IGS Witness White. *See* Motion to Strike. [↑](#footnote-ref-17)
17. Motion to Strike (Sept. 26, 2024) at 3. [↑](#footnote-ref-18)
18. *See* Buckley Testimony at 12:14-14:14, 15:1-16:11. [↑](#footnote-ref-19)
19. June Entry at ¶ 55. [↑](#footnote-ref-20)