

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

**REPLY TO FIRSTENERGY'S MEMORANDUM CONTRA MOTIONS REGARDING
HOUSE BILL 6
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

In an unfortunate display of corporate arrogance, the FirstEnergy Utilities are opposing an investigation by their state regulator, the PUCO, into utility consumer protection issues surrounding what has been described by a prosecutor as “likely the largest bribery scheme ever perpetrated against the state of Ohio.”¹ The PUCO has the authority under Ohio law to investigate the FirstEnergy Utilities and their owner, FirstEnergy Corp. FirstEnergy should get out of the PUCO’s way and cooperate.

FirstEnergy Corp., the company that owns the FirstEnergy Utilities,² is generally understood to be the “Company A” identified in the criminal complaint filed by the U.S.

¹ Nicholas Reimann, “Ohio Speaker of The House Arrested In State’s ‘Largest Bribery Scheme Ever’” Forbes, July 21, 2020 <https://www.forbes.com/sites/nicholasreimann/2020/07/21/ohio-speaker-of-the-house-arrested-in-states-largest-bribery-scheme-ever/#71a8d99037b4>

² Cleveland Electric Illuminating Company, the Ohio Edison Company and Toledo Edison Company.

Attorney for the Southern District of Ohio against the former Ohio House Speaker and others. The criminal complaint alleges that FirstEnergy Corp. paid some \$60 million to secure passage of House Bill 6 (“HB 6”) and to prevent a referendum effort.

OCC filed motions in early September requesting that the PUCO act to protect Ohio consumers by investigating the source of the FirstEnergy money allegedly used for political purposes, to make sure that money did *not* come from consumers’ pockets through charges they pay for electric utility service. Predictably, FirstEnergy opposes OCC’s motions to protect consumers, claiming throughout its response that the PUCO has no authority (jurisdiction) to investigate whether customers improperly funded spending to support HB 6. *See* FirstEnergy Utilities Memorandum Contra at 1-8. That’s wrong.

FirstEnergy misconstrues the plain language of R.C. 4905.05 and R.C. 4905.06 — provisions of law that extend the PUCO’s jurisdiction to public utilities (FirstEnergy Utilities) *and* the companies that own them (FirstEnergy Corp.). FirstEnergy’s baseless arguments should be rejected.

The PUCO should grant OCC’s motions by ordering an independent management audit of FirstEnergy’s corporate governance and activities regarding House Bill 6. And the PUCO should require the independent auditor to publicly file a report of findings and recommendations for consumer protection. Additionally, the PUCO should reopen Case No. 17-2474-EL-RDR, involving the audit of the so-called distribution modernization rider to verify that those (illegal) charges to consumers did not fund corrupt activity regarding House Bill 6.

II. ARGUMENT

- A. **R.C. 4905.05 and 4905.06 (along with R.C. 4909.154) expressly provide the PUCO authority to investigate FirstEnergy Utilities and their owner, FirstEnergy Corp., to determine whether rates charged to customers for electric utility service improperly funded efforts to enact HB 6 and to thwart a referendum.**

FirstEnergy devotes much of its memo contra to telling the PUCO it has no authority to consider the issues raised by OCC's motions.³ Contrary to FirstEnergy's claims, however, the PUCO has broad statutory authority under R.C. 4905.05 and R.C. 4905.06 to investigate the FirstEnergy Utilities and their owner, FirstEnergy Corp. And the PUCO has authority under R.C. 4909.154 to "consider the management policies, practices, and organization" of a public utility. Under this law, the PUCO can require a public utility to supply information about its policies, practices, and organization. The PUCO should use this authority to protect consumers by granting the relief requested in OCC's motions.

FirstEnergy claims that the PUCO, as a creature of statute, has no statutory authority to investigate FirstEnergy Corp. because it is a holding company, not a public utility.⁴ FirstEnergy claims that OCC "misreads" R.C. 4905.05 and R.C. 4905.06.⁵ But it is FirstEnergy itself that misreads these laws.

To be clear, the express language of R.C. 4905.05 – which FirstEnergy misconstrues – grants the PUCO expansive jurisdiction which includes jurisdiction not just over public utilities, but also to "persons or companies" "owning" such public utilities. That language is as follows:

The jurisdiction, supervision, powers, and duties of the public utilities commission extend to *every public utility* and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or

³ Memo Contra, at 1-8.

⁴ *Id.* at 3-4.

⁵ *Id.* at 4.

property that lies within this state; *to the persons or companies owning, leasing, or operating such public utilities* and railroads; *to the records and accounts of the business thereof done within this state*; and to the records and accounts of any companies which are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the “Public Utility Holding Company Act of 1935,” 49 Stat. 803, 15 U.S.C. 79c, and the rules and regulations promulgated thereunder, insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system. (emphasis added)

FirstEnergy Corp. is a company that *owns* the FirstEnergy utilities and thus is subject to the PUCO’s jurisdiction.

FirstEnergy Utilities ignore this initial language that establishes the PUCO’s jurisdiction over them and FirstEnergy Corp. Instead they focus on the words in the statute that come later that extend the PUCO’s jurisdiction to the “records and accounts” that “are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the “Public Utility Holding Company Act of 1935.” FirstEnergy Utilities claim the PUCO has no jurisdiction over FirstEnergy Corp. under this language because the Act has been repealed and FirstEnergy Corp. was not exempt under the Act.⁶

These are red herring arguments. They don’t matter. The words FirstEnergy Utilities rely on provide the PUCO more jurisdiction, not less jurisdiction. They are additive to the first two jurisdictional clauses of R.C. 4905.05 and need not be met for the PUCO to exercise jurisdiction over FirstEnergy Corp. The first two clauses of R.C. 4905.05 provide the PUCO jurisdiction over FirstEnergy and FirstEnergy Corp.: “The jurisdiction, supervision, powers, and duties of the public utilities commission extend to *“every public utility”* whose plant or property lies wholly or partly in the state and *“to the persons or companies owning, leasing, or operating such*

⁶ *Id.* at 4-5.

*public utilities ***.*” And R.C. 4909.154 adds to this authority by allowing the PUCO to consider the management policies, practices and organization of FirstEnergy Utilities.

Following their flawed R.C. 4905.05 argument, FirstEnergy Utilities claim that the general supervisory powers granted to the PUCO under R.C. 4905.06 do not apply to FirstEnergy Corp.⁷ FirstEnergy argues that because First Energy Corp. is not subject to the PUCO authority under R.C. 4905.05, then it is not one of the “companies referred to in section 4905.05.” But, because FirstEnergy is wrong about R.C. 4905.05, it is also wrong about R.C. 4905.06.

R.C. 4905.06 grants the PUCO general supervision over public utilities and over “all other companies referred to under R.C. 4905.05” – companies which include FirstEnergy Corp. (because it owns a public utility with property in this state.). Here are the words under R.C. 4905.06, which allow the PUCO to exert its general supervisory jurisdiction over FirstEnergy Corp.:

The public utilities commission ***has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities*** and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. ***The commission has general supervision over all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section, and may examine such companies*** and keep informed as to their general condition and capitalization, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, ***and their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies.*** (emphasis added)

⁷ *Id.* at 5.

Again, the FirstEnergy Utilities are “public utilities” within the PUCO’s scope of jurisdiction under R.C. 4905.05 and FirstEnergy Corp. is among the “other companies referred to in section 4905.05 ***.” And the PUCO also has authority under R.C. 4909.154 to consider the management policies, practices and organization of FirstEnergy utilities.

Thus, the PUCO, as a creature of statute, has authority to examine both FirstEnergy and FirstEnergy Corp. The PUCO may “examine such public utilities” with respect to “their compliance with all laws [and], orders of the commission.” And the PUCO may “examine such companies” (FirstEnergy Corp.) with respect to “their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies.” These laws expressly allow the PUCO to examine whether the “costs associated with the provision of electric utility service” to Ohio consumers were used directly or indirectly to fund activities to support House Bill 6 or to prevent a referendum on House Bill 6.

B. The PUCO has jurisdiction to examine utilities’ compliance with law and PUCO orders without requiring evidence of a violation.

FirstEnergy Utilities also allege that the PUCO does not have jurisdiction to investigate them.⁸ They seem to believe that there must be evidence that an Ohio utility law or PUCO order has been violated before the PUCO can examine the issue. This is an odd argument, especially given that the PUCO just asserted jurisdiction over FirstEnergy Utilities by opening a case (docketed as 20-1502-EL-UNC) and directing FirstEnergy Utilities to show cause that political and charitable contributions related to House Bill 6 were not directly or indirectly funded by

⁸ Memo Contra, at 6-8.

customers. If FirstEnergy Utilities believed that the PUCO lacked jurisdiction, they should have challenged the Entry by filing an Interlocutory Appeal. But they did not.

And FirstEnergy Utilities ignore the evidence that currently exists in the distribution modernization docket that they may have violated a PUCO Order when they used modernization funds collected from customers for dividends or allowed other non-Ohio affiliates to borrow the funds from the regulated money pool.⁹ The allegations in the criminal complaint about illegal payments made by FirstEnergy Corp., and/or FirstEnergy Service Co. also raise the question of whether the distribution modernization funds were used as part of the alleged bribery scheme.

And, of course, there is more. There are various organizations conducting investigations, in addition to what apparently is the ongoing federal criminal investigation. There is a recently announced investigation by the Securities and Exchange Commission. There is an internal investigation by FirstEnergy, “at the direction of the independent members of its Board of Directors.”¹⁰ There are shareholder lawsuits. But those investigations are for different purposes than a PUCO investigation for protection of FirstEnergy Utilities’ electric consumers.

In addition, on September 23, 2020, the State of Ohio filed a lawsuit against what the Ohio Attorney General refers to as the “Unholy Alliance” of actors including FirstEnergy Corp., FirstEnergy Solutions, FirstEnergy Service Company, Energy Harbor, the former Ohio House Speaker and his associates and Generation Now.¹¹ The complaint claims that FirstEnergy Corp.

⁹ *In the Matter of Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 17-2474-EL-RDR, Oxford Mid-Term Audit at 16-17 (June 14, 2019).

¹⁰ FirstEnergy Corp. Form 10-Q at 39 (Aug. 17, 2020); <https://investors.firstenergycorp.com/Doc/Index?did=59960192>

¹¹ *See State of Ohio v. FirstEnergy Corp. et al.* (September 23, 2020), at 4-6. <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-A1.aspx>.

and the Unholy Alliance engaged in corrupt activities, violating Ohio law, to support the enactment of House Bill 6. According to the complaint, these corrupt activities were “rooted in financial distress, political ambition, and greed.”¹² The complaint states the FirstEnergy’s and the Unholy Alliance’s corrupt activity “wounded” Ohio by, among other things, unlawfully taking \$1.3 billion from Ohio’s residential electric customers and businesses.¹³

To be sure, the \$60 million FirstEnergy Corp. allegedly paid to secure the enactment and survival of House Bill 6 came from somewhere. As a utility and utility franchise holder for serving Ohioans, and as a utility owner, FirstEnergy and FirstEnergy Corp. should be cooperating with state officials in investigations of whether millions of utility customers were harmed.

C. The PUCO has jurisdiction to determine if customers were improperly made to pay for political and charitable contributions associated with House Bill 6 activities.

Next, FirstEnergy argues that even if there were evidence that the “Companies” were making contributions or donations, that is a matter that falls outside the PUCO’s jurisdiction.¹⁴ Not right. The PUCO can preclude a utility from charging customers for such contributions. In fact, utilities are generally prohibited from charging those expenses to customers because those expenses are not a cost that is necessary in the provision of utility service.¹⁵

FirstEnergy’s argument also ignores the express language in R.C. 4905.05 and 4905.06. R.C. 4905.05 extends the PUCO jurisdiction to the records and accounts of all public utilities

¹² *Id.*

¹³ *Id.* at 7.

¹⁴ *Id.* at 8.

¹⁵ See e.g. *Cleveland Electric Illuminating Co. v. Public Utilities Com.*, 69 Ohio St.2d 258 (1982) (“[C]haritable contributions, as a category of expenditures, are not a cost of rendering public utility service within the meaning of R.C. 4909.15(A)(4) [and] [a]llowing such contributions as an expense would disadvantage ratepayers by forcing them to pay for the contributions.”)

with property wholly or partly in the state. R.C. 4905.06 also gives the PUCO jurisdiction to examine and keep informed about public utilities for compliance with all laws and orders of the commission.

FirstEnergy Utilities also argue that the PUCO “lacks jurisdiction over political expenses and donations to 501(c)(4) entities, whether made by public utilities or their parent companies, *unless those expenses are included in rates charged to customers.*”¹⁶ But determining whether FirstEnergy Utilities’ or FirstEnergy Corp.’s payments to 501(c)(4) entities to support House Bill 6 came from customer charges is precisely why OCC has requested that the PUCO order an independent auditor. FirstEnergy Utilities want the PUCO to take their word that customer charges, some of which the Supreme Court found to be illegal (*i.e.* the distribution modernization charge), did not fund illegal activities related to House Bill 6. FirstEnergy Utilities’ word is no substitute for the state regulator to investigate and audit FirstEnergy Utilities for protection of Ohio consumers.

FirstEnergy Utilities also state that they have no rate or rider to recover charges from customers for political and charitable spending.¹⁷ That argument is beside the point. Even if there is not a designated rate component for political and charitable spending, that does not mean that they did not use customer charges (supposed to be used for providing electric service) for political and charitable contributions that funded the illegal activities alleged by federal prosecutors. Indeed, charges collected through the illegal distribution modernization charge were not used to modernize the distribution system. They were used as credit support and loaned out to entities that do not even operate in this state.

¹⁶ Memo Contra, at 1.

¹⁷ *Id.* at 5.

The PUCO has a sufficient governmental concern about how customer money may have been used by FirstEnergy as to exercise its authority to investigate. FirstEnergy should get out of the PUCO's way and cooperate.

D. The PUCO has authority to conduct an independent management audit of public utilities under its jurisdiction in conjunction with its review of corporate separation issues.

FirstEnergy Utilities argue that there is no legal basis for a management audit of FirstEnergy Utilities' House Bill 6 expenditures that OCC has requested in conjunction with FirstEnergy's corporate separation case.¹⁸ And FirstEnergy Utilities argue that there has been no established scope of work and no showing that an audit is necessary.¹⁹ The Companies believe the corporate separation case should be left undisturbed and should run its course "without further interference and delay from OCC." The Companies are mistaken.

Under R.C. 4928.17, a utility must submit a corporate separation plan for PUCO approval. That plan must satisfy "the public interest in preventing unfair competitive advantage and preventing the abuse of market power," per R.C. 4928.17(A)(2). And it must be "sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service," per R.C. 4928.17(A)(3). Ohio law also established state policy to protect competition by avoiding subsidies between and among competitive and non-competitive retail electric services, in R.C. 4928.02(H).

Information in the U.S. Criminal Complaint about FirstEnergy Corp. and other FirstEnergy affiliates raise utility regulatory issues for protection of Ohio utility consumers. The

¹⁸ *Id.* at 13.

¹⁹ *Id.*

Criminal Complaint alleges that Company A (widely thought to be FirstEnergy Corp.) illegally used “\$60 million” to help to “pass House Bill 6, legislation described by an Enterprise member as a billion-dollar ‘bailout’ that saved from closure two failing nuclear power plants in Ohio affiliated with Company A,”²⁰ The failing nuclear plants referenced were owned at the time by FirstEnergy affiliate, FirstEnergy Solutions.

If FirstEnergy utilities assisted their affiliate (FirstEnergy Solutions), such as with money, personnel and so forth, then such a transaction may directly violate R.C. 4928.17(A)(3) which precludes undue preference or advantage from being given by a utility to its affiliate engaged in the business of supplying competitive retail electric service. Similarly, if the FirstEnergy Utilities directly or indirectly assisted FirstEnergy Solutions, that may have violated R.C. 4928.02, which precludes subsidies flowing from a non-competitive retail electric service to a competitive retail electric service. And there may be PUCO rulings and Orders that are being violated as well.

Thus, contrary to FirstEnergy Utilities’ arguments otherwise, there are legal bases and grounds, anchored in Ohio law, for an audit to be performed within the context of the corporate separation proceeding. The scope of the audit must include corporate governance issues that include an examination of how the corporate governance system functioned or failed to function. If breakdowns in the corporate governance system occurred the PUCO may need to step in to remedy such deficiencies, as it has in the past, consistent with its authority under R.C.

4909.154.²¹

²⁰ *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes, and Generation Now*, Case No. 1:20-MJ-00526, Affidavit of Blane J. Wetzel in Support of a Criminal Complaint at ¶ 9 (U.S. Dist. S.D.) (July 17, 2020).

²¹ *In the Matter of the Investigation into the Gas Purchasing Practices and Policies of Columbia Gas of Ohio*, Case No. 83-135-GA-COI, Opinion and Order at 43 (Oct. 8, 1985).

E. The PUCO has jurisdiction to reopen the Rider DMR Audit Case for good cause and should do so.

A reasonable question related to a regulated utility (like FirstEnergy Utilities), that has monopoly customers, would involve knowing the source of funds (alleged to be \$60 million²²) used toward passage of House Bill 6. Questions should include confirming that the “loosey-goosey” distribution modernization charge money that FirstEnergy Utilities collected from customers was used lawfully and in compliance with PUCO orders for electric utility service.²³ There is in fact good cause to reopen the Distribution Modernization case. But first it should be noted that, per Ohio Adm. Code 4901-1-02(E) and (E)(1), the case is still open as shown in PUCO docketing.

FirstEnergy argues that OCC’s motion to reopen the Rider DMR audit case is too late and cannot be granted.²⁴ However, the House Bill 6 scandal came to light after that case was referenced in an Entry as “closed.” Thus, there is good cause to reopen that case to reexamine the issues. Moreover, even if the PUCO accepts FirstEnergy Utilities’ argument, the PUCO should then include the review of the distribution modernization rider within a larger part of the management performance audit, as OCC alternatively recommended. The distribution modernization charge case had an odd ending, given the findings of the auditor that were never addressed in a PUCO order – and that now (post-House Bill 6 scandal) are even more ripe for resolution.

²² *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes, and Generation Now*, Case No. 1:20-MJ-00526, Affidavit of Blane J. Wetzel in Support of a Criminal Complaint at ¶ 9 (U.S. Dist. S.D.) (July 17, 2020).

²³ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illumination Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at ¶282 (Oct. 12, 2016).

²⁴ Memo Contra, at 14-15.

F. The PUCO has jurisdiction to issue a show cause order against FirstEnergy Utilities to prove that they have not wrongfully charged their customers for House Bill 6 activities.

FirstEnergy Utilities argue that OCC's request for a show cause Order from the PUCO is a "kitchen sink" motion that is improper and moot now that the PUCO has opened Case No. 20-152-EL-UNC. That argument should be rejected.

For the reasons explained above, the PUCO has jurisdiction under R.C. 4905.05 and 4905.06 (and 4909.154) over both FirstEnergy and FirstEnergy Corp. with respect to "their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies." This means that the PUCO can examine whether the "costs associated with the provision of electric utility service" to FirstEnergy's consumers were used directly or indirectly to fund activities by FirstEnergy Corp. (or FirstEnergy) to support HB 6 or to prevent a referendum on HB 6.

While the PUCO's directive to FirstEnergy in Case No. 20-1502-EL-UNC to show cause is a step in the right direction, much more is required to protect consumers. In the interest of justice for Ohio consumers, the PUCO should expand its show cause order in Case No. 20-1502-EL-UNC to require both FirstEnergy and FirstEnergy Corp. to demonstrate that they did not violate any Ohio regulatory laws or PUCO rules or orders with respect to their House Bill 6 activities.

III. CONCLUSION

The FirstEnergy Utilities and their owner, FirstEnergy Corp., should be cooperating with the PUCO for a full investigation of whether electric utility consumers and their electric service were harmed by FirstEnergy activities involved in the House Bill 6 scandal. At a minimum

FirstEnergy should get out of the PUCO's way. To protect millions of electric utility consumers, the PUCO should grant OCC's motions regarding an investigation of FirstEnergy Utilities and their involvement in the House Bill 6 scandal.

Respectfully submitted,

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I hereby certify that a copy of this Reply was served on the persons stated below *via* electronic transmission, this 30th day of September 2020.

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Summary: Reply Reply to FirstEnergy's Memorandum Contra Motions Regarding House Bill 6 by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.