

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case No. 21-0101-EL-ATA
Illuminating Company, and The Toledo)
Edison Company for Approval of Tariff)
Amendments.)

**APPLICATION FOR REHEARING
(FOR RETURNING TO CONSUMERS \$30 MILLION OF FIRSTENERGY'S
RECESSION-PROOFING CHARGES IN HOUSE BILL 6)
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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March 4, 2021

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The Office of the Ohio Consumers' Counsel ("OCC") appeared in this case by moving to intervene, on February 2, 2021, prior to the PUCO's decision. The PUCO acted on FirstEnergy's filing in one day, so time for advocacy was very limited.

OCC asked in its motion to intervene for consumer refunds of House Bill 6 ("H.B.6") decoupling charges paid to date.¹ But, in granting FirstEnergy's application to halt the decoupling charges (or recession-proofing charge, as FirstEnergy's fired CEO called it), the PUCO erred in not also ordering the return of about \$30 million to consumers that FirstEnergy already had charged them. OCC's Application for Rehearing is to remedy what would be a miscarriage or perversion of justice in this state should FirstEnergy walk away profiting from tainted H.B.6 with about \$30 million of Ohioans' money. Ohioans need their PUCO to act. (It is unknown if the General Assembly will enact a law to itself remedy this travesty.)

The PUCO should grant OCC's Application for Rehearing because the PUCO's February 2, 2021 Finding and Order is unreasonable and unlawful, as follows:

¹ *In Re FirstEnergy*, Case No. 21-101-EL-ATA, OCC Motion to Intervene, at page 2 of Memorandum (Feb. 2, 2021).

ASSIGNMENT OF ERROR: Given the need to prevent a miscarriage or perversion of justice in this state where FirstEnergy is benefiting financially from tainted House Bill 6, the PUCO erred when it did not act under R.C. 4909.16 to “judge[]” that the H.B.6 scandal constitutes an “emergency” and “deem[] it necessary to prevent injury to the business or interests of the public...” by acting to “temporarily alter” or “amend” FirstEnergy’s decoupling charge to a negative charge (instead of \$0.00) so as to reduce the bills of its two million consumers until the estimated \$30 million is returned to them.

As supported in the memorandum below, the PUCO should grant rehearing and modify its February 2, 2021 Finding and Order, consistent with this Application for Rehearing for consumer protection.

Respectfully submitted,

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/s/ John Finnigan

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The PUCO failed, in its Finding and Order, to order the return (to consumers) of the H.B.6 decoupling charges collected by FirstEnergy prior to the PUCO’s elimination of the charge. The H.B.6 decoupling charges that FirstEnergy collected are estimated to be about \$30 million. On rehearing, the PUCO should order FirstEnergy to return to consumers all decoupling charges collected from its two million customers under tainted H.B.6.

On February 1, 2021, FirstEnergy filed an Application to end its H.B.6 decoupling charges to consumers. In the “Reason for Proposal” section of its Application, FirstEnergy’s sole explanation for its request was “Pursuant to ORC 4909.18, the Companies propose to modify Rider CSR, to set Rider CSR to zero, effective within five business days following the Commission’s approval of this Application.”²

On February 2, 2021, the PUCO approved³ FirstEnergy’s Application, without addressing OCC’s Motion to Intervene filed earlier that day, which included a request for

² *Id.* Application at 9, Exhibit C-3 (Feb. 1, 2021).

³ *Id.* Finding and Order (Feb. 2, 2021).

refunds.⁴ FirstEnergy filed final tariffs on February 5, 2021, which set the tariffed charge to zero (\$0.00).⁵ Accordingly, the charge ended as of February 9, 2021.

On the general process of tainted H.B. 6, Governor DeWine commented that it “stinks.”⁶ A news outlet wrote about H.B.6 under the headline “Ohio just passed the worst energy bill of the 21st century.”⁷ U.S. Attorney David DeVillers described the scandal as “likely the largest bribery, money-laundering scheme ever perpetrated against the people of the state of Ohio.”⁸

Standard and Poor’s unfavorably analyzed FirstEnergy this way, in connection with the scandal:

We believe these violations at the highest level of the company are demonstrative of insufficient internal controls and a cultural weakness. We view the severity of these violations as significantly outside of industry norms and, in our view, they represent a material deficiency in the company's governance.⁹

There has been fallout in the scandal’s aftermath. Gone are the Speaker of the Ohio House of Representatives, FirstEnergy’s CEO and other executives, and the PUCO Chair. Some others have pleaded guilty to crimes. And it’s not known what else may yet be revealed about the scandal.

⁴ *Id.* Motion to Intervene by Office of the Ohio Consumers’ Counsel at 2 of Memorandum (Feb. 2, 2021).

⁵ *Id.* Tariff Updates to Rider CSR (Feb. 5, 2021).

⁶ Cleveland.com, *Gov. Mike DeWine calls for repeal of House Bill 6, reversing his position from the day before* (July 23, 2020), available at: <https://www.cleveland.com/open/2020/07/gov-mike-dewine-calls-for-repeal-of-house-bill-6.html>

⁷ Vox.com, *Ohio just passed the worst energy bill of the 21st Century* (July 27, 2019), available at: <https://www.vox.com/energy-and-environment/2019/7/27/8910804/ohio-gop-nuclear-coal-plants-renewables-efficiency-hb6>

⁸ Dayton247now.com, *Ohio House Speaker Householder faces racketeering charges*, (July 21, 2020), available at: <https://dayton247now.com/news/local/upcoming-charges-to-be-announced-in-bribery-case-against-state-official>

⁹ Spglobal.com, *S&P downgrades FirstEnergy following \$1.95B draw on revolving credit facility* (Nov. 25, 2020), available at: <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/s-p-downgrades-firstenergy-following-1-95b-draw-on-revolving-credit-facility-61442506>

Revised Code Section 4903.10 authorizes “any party who has entered an appearance” to apply for rehearing on any matters decided in the case within 30 days of the PUCO’s order.¹⁰ The OCC meets these requirements as it entered an appearance and is making this filing within 30 days of the PUCO’s order. After rehearing, the PUCO may either abrogate or modify its order.¹¹ The OCC does not seek to abrogate the PUCO’s order setting the decoupling tariffs to zero. Rather, OCC seeks to modify the order by requiring FirstEnergy to replace the zero with a negative charge for returning to consumers the \$30 million it collected under tainted H.B.6.

A backdrop to this issue is the ongoing travesty of justice involving the lack of refunds that has cost Ohio electric consumers \$1.5 billion in denied refunds (and unjustly enriched utilities), after Court reversals of PUCO orders. (See attached pie charge on denied refunds.) Indeed, FirstEnergy is at the core of this prior travesty of justice. It got to keep (without refunds to consumers) \$465 million of an illegal charge (the so-called distribution modernization charge) after the Supreme Court threw out¹² the PUCO’s Order. (That happened because the PUCO had declined¹³ to make the charge subject to refund when asked to do so by OMA and OCC.)

For reasons we will explain, the scandal of H.B.6 is certainly not an occasion to deny consumers a return of their money from FirstEnergy.

¹⁰ R.C. 4903.10.

¹¹ *Id.*

¹² *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401.

¹³ *In re FirstEnergy ESP IV*, Case No. 14-1297-EL-SSO Finding and Order (Dec. 21, 2016).

II. ARGUMENT

ASSIGNMENT OF ERROR 1: Given the need to prevent a miscarriage or perversion of justice in this state where FirstEnergy is benefiting financially from tainted House Bill 6, the PUCO erred when it did not act under R.C. 4909.16 to judge[] that the H.B.6 scandal constitutes an “emergency” and “deem[] it necessary to prevent injury to the business or interests of the public...” by acting to “temporarily alter” or “amend” FirstEnergy’s decoupling charge to a negative charge (instead of \$0.00) so as to reduce the bills of its two million consumers until the estimated \$30 million is returned to them.

The Ohio legislature recognized that emergencies arise where the PUCO would need to take immediate action and make changes outside the usual statutory framework to prevent injury to the public. Hence, the PUCO has available to it what is commonly known as the emergency statute, R.C. 4909.16.

The H.B.6 scandal is such an emergency for the state and its public. The PUCO should act under R.C. 4909.16 to temporarily alter or amend FirstEnergy’s rates to flow back to consumers the \$30 million in decoupling charges that FirstEnergy collected under tainted H.B.6. The PUCO erred by not invoking its emergency power to remedy this travesty of justice.

Revised Code 4909.16 vests the PUCO with vast emergency powers as follows:

When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.¹⁴

This emergency power is quite broad. The Supreme Court has stated that the PUCO need only meet two conditions before invoking its emergency authority: “(1) ... the relief sought

¹⁴ *Id.*

under R.C. 4909.16 is necessary to prevent injury, and (2) ... such relief is necessary ‘in case of any emergency *to be judged by the commission.*’”¹⁵ Both conditions are met here. Ohioans have been injured by paying \$30 million to FirstEnergy as part of “the greatest bribery and money laundering scheme in Ohio history.” And emergency relief is the way the PUCO can serve justice by returning the \$30 million to customers who paid it and by avoiding a further crisis in public confidence in their state government should FirstEnergy profit from the House Bill 6 scandal.

As an example of the PUCO’s emergency powers, in 2001 the PUCO found an emergency existed for certain of East Ohio’s gas customers. They were facing a difficult financial situation and some East Ohio customers had been disconnected because they were unable to make necessary payments. The PUCO approved a payment-matching program to provide additional assistance and prevent injury to the public.¹⁶

A more recent example of the PUCO’s use of emergency powers involves its response to the Coronavirus pandemic, with an Emergency Order.¹⁷ In that situation, the PUCO suspended disconnections of consumers for non-payment. And the PUCO commenced reconnections and waived certain fees and deposits to protect consumers who were facing serious financial emergencies due to the pandemic.

¹⁵ *In re Columbus & Southern Elec. Co. Rate Increase*, 45 Ohio St.2d 151, 153, 341 N.E. 2d 839, 840 (1976) (emphasis in original).

¹⁶ *See In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval, Pursuant to Section 4909.16, Revised Code, of a Payment Matching Program and Other Matters, Case No. 01-2592-EL-ORD, Entry on Rehearing at par. 11* (Nov. 29, 2001).

¹⁷ *In re the Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC (Emergency Case), Entry (Mar. 12, 2020) Entry (Mar. 13, 2020)

Earlier in this filing OCC listed some of the unprecedented elements of the Ohio scandal involving H.B.6. That is the legislation that FirstEnergy so desperately sought for a bailout of its former nuclear power plants (now owned by Energy Harbor).

The scandal is a crisis of government and industry with a number of bad plotlines, but certainly money is a common thread. And so the prospect of FirstEnergy profiting from the scandalous legislation is repugnant to good government and good corporate governance that the public in this state has every right to expect. Moreover, that FirstEnergy's financial gain from the tainted legislation comes at public expense is all the more offensive. It undermines the public's confidence in their own state government. This situation is an emergency, and the PUCO should use the powers the legislature gave it to rectify emergencies, in R.C. 4909.16. The PUCO should grant rehearing, invoke its emergency authority and order FirstEnergy to return the \$30 million to its two million consumers by altering or amending the tariff to a negative charge or otherwise returning the money to consumers.

III. CONCLUSION

To protect customers from unreasonable and unlawful charges in the public crisis of state government and corporate governance that is tainted House Bill 6, the PUCO should grant rehearing. On rehearing the PUCO should invoke its emergency powers to prevent the perpetrating of a miscarriage of justice against Ohioans. And the PUCO should then order a return of \$30 million to two million FirstEnergy consumers to protect them from being further victims of tainted H.B.6.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ John Finnigan

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(willing to accept service by e-mail)

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 4th day of March 2021.

/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:

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OHIOANS DENIED \$1.5 BILLION IN ELECTRIC REFUNDS SINCE 2009

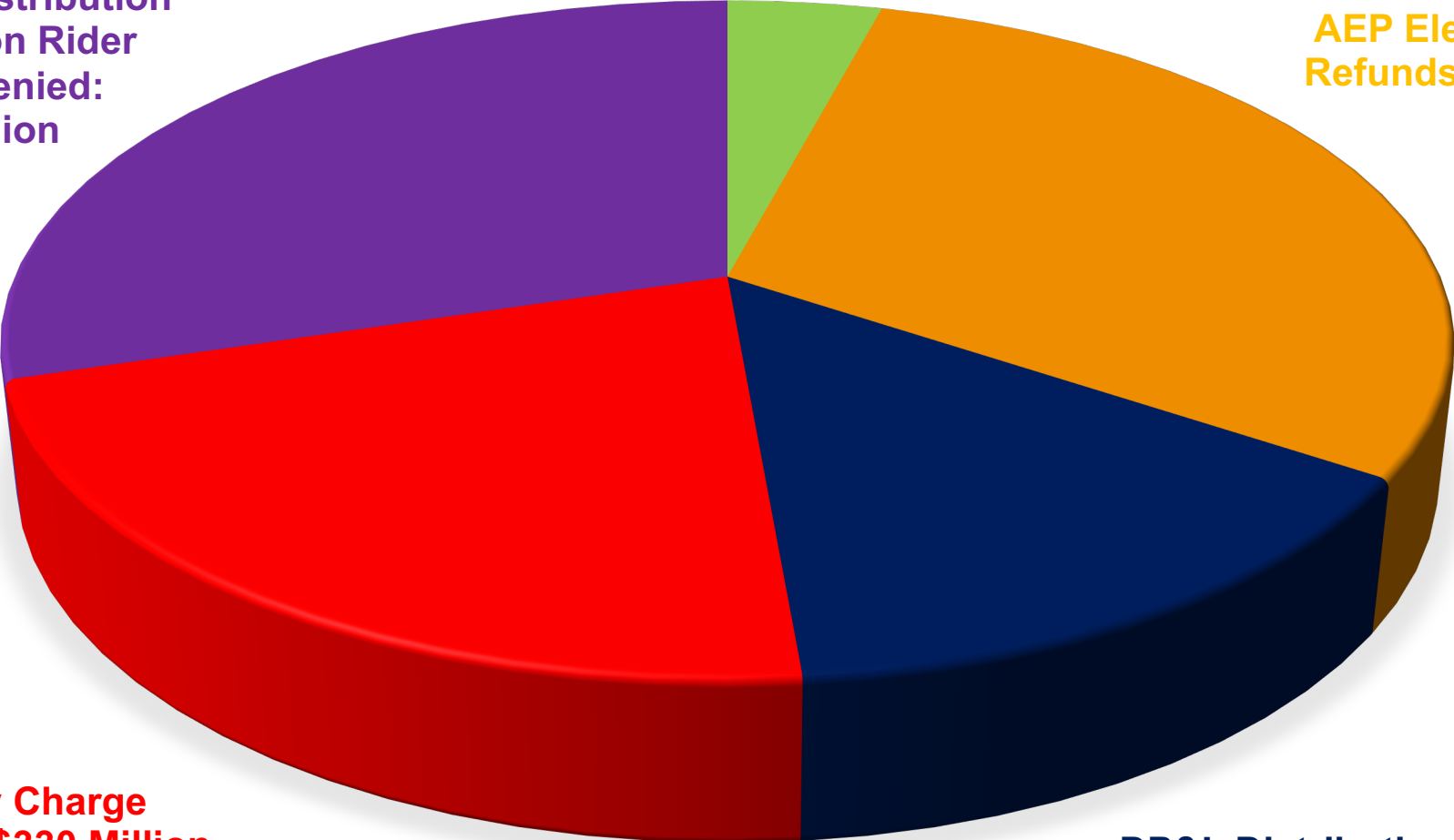
AEP Electric Security Plan I
Refunds Denied: \$63 Million

AEP Electric Security Plan II
Refunds Denied: \$463 Million

FirstEnergy Distribution
Modernization Rider
Refunds Denied:
\$456 Million

DP&L Stability Charge
Refunds Denied: \$330 Million

DP&L Distribution Modernization Rider
Refunds Denied: \$218 Million



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Case No(s). 21-0101-EL-ATA

Summary: App for Rehearing Application for Rehearing (For Returning to Consumers \$30 Million of FirstEnergy's Recession-Proofing Charges in House Bill 6) by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Finnigan, John