

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Political)
and Charitable Spending by Ohio Edison) Case No. 20-1502-EL-UNC
Company, The Cleveland Electric)
Illuminating Company, and the Toledo)
Edison Company.)

REVISED¹
**MOTION FOR AN INDEPENDENT AUDITOR TO INVESTIGATE AND AUDIT THE
POLITICAL AND CHARITABLE ACTIVITY OF FIRSTENERGY ENTITIES RELATED
TO TAINTED HOUSE BILL 6**
AND
**MOTION FOR THE PUCO TO APPOINT A COMMITTEE INDEPENDENT OF THE
PUCO TO HIRE AND OVERSEE THE INDEPENDENT INVESTIGATION AND AUDIT**
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

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¹ This document contains redactions to the attachments, as requested by the PUCO.

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PUCO Attorney Examiner Greg Price initiated this case, but without an independent, external auditor to investigate FirstEnergy's political and charitable spending related to tainted House Bill 6. It is the only one of the PUCO's four House Bill 6-related investigations without an auditor. At the time, the PUCO was comprised of Chair Sam Randazzo and the four current Commissioners. Since this case was opened, FirstEnergy Corp. was charged with a federal crime.

OCC moves for an independent, external auditor to investigate FirstEnergy's political and charitable spending related to tainted House Bill 6. OCC also moves the PUCO to appoint an independent review panel to hire and oversee that auditor. Former U.S. Attorney David

DeVillers described the H.B.6 scandal as "likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio."²

OCC has sought answers for whether the FirstEnergy Utilities used utility consumers' money to subsidize their corporate parent or other affiliates in political and charitable spending in support of tainted H.B.6. The PUCO initiated this case in response to OCC's September 8, 2020 investigatory motions. OCC sought a management audit of FirstEnergy (not granted by the PUCO) and other consumer protections. The case was initiated without an auditor.

Recently, as part of a deferred prosecution agreement, FirstEnergy Corp. "admits, accepts, and acknowledges that it is responsible under United States law for the acts as charged in the Information and as set forth in the Statement of Facts" involving the federal crime of honest services wire fraud.³ The matter is said to involve bribery or kickbacks paid to Public Official A and Public Official B. Public Official A is identified in the Deferred Prosecution Agreement as the Speaker of the Ohio House of Representatives from January 7, 2019 to July 30, 2020.⁴ Public Official B is identified as the Chairman of the PUCO from April 2019 until November 21, 2020, when he resigned.⁵ It is said that "FirstEnergy Corp. paid \$4.3 million dollars to Public Official B [the former PUCO Chair] through his consulting company in return for Public Official B performing official action in his capacity as PUCO Chairman to further

² Horn, D. "Ohio House Speaker Larry Householder arrested in \$60 million bribery case." The Cincinnati Enquirer (July 31, 2020). <https://www.cincinnati.com/story/news/2020/07/21/ohio-bribery-case-state-official-charged-federal-prosecutors/5477862002/>.

³ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 1 (July 22, 2021).

⁴ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 22, 2021).

⁵ *Id.*

FirstEnergy Corp’s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”⁶

Following these admissions, the FirstEnergy Utilities filed a “supplemental response” at the PUCO. There they admitted that part of the \$4.3 million payment was for political spending on H.B.6 and was allocated among the FirstEnergy Utilities, ultimately increasing the 2020 rates to Ohio utility consumers paying pole attachment rates.⁷ Only the intricacies of a complex ratemaking formula under the utilities’ delivery capital recovery rider (and not FirstEnergy) prevented a greater charge to Ohio utility consumers under FirstEnergy’s accounting.

In this regard, PUCO Attorney Examiner Price made a ruling in this case, on March 10, 2021, that ended OCC’s deposition questioning of the FirstEnergy Utilities about the \$4.3 million payment to an entity owned by the former PUCO Chair. However, FirstEnergy’s later admission, in its above-referenced supplemental response and in the deferred prosecution agreement, reflects that the Attorney Examiner’s ruling against OCC was not well made and was based on a mistake of fact:

[by PUCO Examiner Price] “I definitely do not believe that payments to the regulator [former PUCO Chair] were in any part considered by the Commission to be political or charitable contributions or spending as part of House Bill 6***.”⁸

The PUCO is conducting four investigations that touch on FirstEnergy’s H.B.6-related activities and has ordered audits in three of those cases.⁹ But in Case No. 20-1502 the PUCO did

⁶ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 22, 2021).

⁷ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Motion for Leave to file a Supplemental Response to the September 15, 2020 Show Cause Entry, Response at 1-2 (Aug. 6, 2021).

⁸ Deposition of Santino Fanelli, Tr. II at 253 (Mar. 10, 2021).

⁹ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC; *In the Matter of the Review of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s*

not order an independent audit. And the FirstEnergy Utilities' delay and distract tactics have stymied the state consumer advocate's (OCC's) discovery in this case for months on end. As a result, FirstEnergy has avoided a full investigation into its political and charitable spending in support of H.B.6.

In the absence of an auditor, this case's situation is somewhat akin to allowing FirstEnergy to investigate itself. The PUCO merely asked the FirstEnergy Utilities to file a paper response to a PUCO directive, with no independent auditor to investigate the rates and charges to consumers.

OCC's concern about FirstEnergy *essentially being allowed to investigate itself* in this PUCO case is a theme in a federal case where United States District Judge Marbley recently ruled. The federal Judge emphasized the importance of an independent and disinterested review that must take place (in a shareholder derivative suit against officers of FirstEnergy).¹⁰ (See attached District Court Order) (Attachment 5). There the Judge denied FirstEnergy Corp.'s request for a stay on discovery, finding that FirstEnergy Corp. spent months allowing the former FirstEnergy officers to *investigate themselves* under the auspices of an Independent Review Committee. The federal Judge stated that FirstEnergy Corp. "cannot have thought this committee to be a valid substitute" for an "independent and disinterested" special litigation committee.¹¹

As stated, FirstEnergy Corp. reached a deferred prosecution agreement with the United States Attorney's Office (Southern District of Ohio) where it "admits, accepts, and acknowledges

Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37, Case No. 17-974-EL-UNC; *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of FirstEnergy*, Case No. 20-1629-EL-RDR; *In the Matter of the Review of the Distribution Modernization Rider of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 17-2474-EL-RDR.

¹⁰ *Employees Retirement System of the City of St. Louis v. Charles E. Jones*, Case No. 2:20-cv-4813, Opinion & Order on Motion to Stay (Oct. 20, 2021).

¹¹ *Id.* at 6.

that it is responsible under United States law for the acts as charged in the Information and as set forth in the Statement of Facts” related to defrauding the public through bribery or kickbacks in violation of Title 18, United States Code, Sections 1343, 1346, 1349.¹² Importantly, FirstEnergy’s obligations under the deferred prosecution agreement include FirstEnergy’s consent “*to any and all disclosures to other governmental authorities of such materials [information, testimony, documents, records or other tangible evidence provided to the government under the agreement] as the government, in its sole discretion, shall deem appropriate.*”¹³ In this regard, the PUCO and OCC are, of course, part of government. If FirstEnergy fails to provide “full, complete, and truthful cooperation,” the deferred prosecution agreement will be violated.¹⁴

For these reasons, OCC moves the PUCO for an independent, external auditor to investigate FirstEnergy’s political and charitable spending related to H.B.6. And OCC moves the PUCO to appoint an independent review panel to hire and oversee that audit.

These motions should be granted in the public interest, per O.A.C. 4901-1-12 and other authority including R.C. 4905.05 and 4905.06. The bases for these motions are set forth in more detail in the attached Memorandum in Support.

¹² *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 1, 17 (July 22, 2021).

¹³ *Id.* at A.6 (emphasis added).

¹⁴ *Id.*

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In July of last year, the U.S. Attorney filed a criminal complaint alleging that a certain “Company A” – identified as a public¹⁵ utility holding company – bribed public officials (now known to be Ohio’s former House Speaker) to enact H.B.6. In the U.S. Attorney’s criminal complaint, it is said that over \$60 million was paid to pass H.B.6 and defeat the ensuing referendum efforts, with the payments funneled through a number of dark money groups including “Generation Now.”¹⁶ We also now know that the former PUCO Chair was, according to FirstEnergy Corp and the U.S. government, being paid by FirstEnergy Corp. to “further FirstEnergy Corp.’s interests” relating to passage of H.B.6 and “other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”¹⁷

OCC filed investigatory motions, shortly after the criminal complaint was filed, seeking consumer protections through a broad PUCO review of these matters. In response, on September

¹⁵ *United States of America v. Larry Householder, Jeffrey Longstreth. Neil Clark, Matthew Borges, Juan Cespedes and Generation Now*, Case No. 1:20-MJ-00526 (S.D. Ohio).

¹⁶ *United States of America v. Larry Householder, Jeffrey Longstreth. Neil Clark, Matthew Borges, Juan Cespedes and Generation Now*, Case No. 1:20-MJ-00526 (S.D. Ohio).

¹⁷ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 22, 2021).

15, 2020, PUCO Attorney Examiner Price determined that “this proceeding should be opened to review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6, and the subsequent referendum effort.”¹⁸ The PUCO directed the FirstEnergy Utilities “to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of Am. Sub. H.B.6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state.”¹⁹ PUCO Attorney Examiner Price did not order that an auditor be hired for the investigation. At the time, the PUCO was comprised of Chair Sam Randazzo and the four current Commissioners.

The PUCO later stated that it was “determined to act in a deliberate manner, based upon facts rather than speculation, and with due consideration to the limits on our statutory authority over FirstEnergy Corp. and over the political and charitable activity of all public utilities in this state.”²⁰ While the PUCO wants to act on facts, there needs to be an adequate investigation to obtain facts. An auditor should be hired as part of obtaining the facts – and the truth.

On Sept. 30, 2020, in Case 20-1502, the FirstEnergy Utilities filed a response to the PUCO order opening this case, denying that they had charged consumers for H.B.6 spending: “it is not possible for the Companies’ base rates to include H.B.6 costs. Also, the Companies’ ratepayers have not paid any other riders or charges that include H.B.6 costs.”²¹ The

¹⁸ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC Entry at ¶5 (Sept. 15, 2020).

¹⁹ *Id.*

²⁰ *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 ¶17 (Nov. 4, 2020).

²¹ FirstEnergy Utilities’ Response at 1 (Sept. 30, 2020).

FirstEnergy Utilities' response was accompanied by an affidavit from Santino Fanelli, Director of Rates and Regulatory Affairs, FirstEnergy Service Company.

Two months later, FirstEnergy Corp. disclosed a \$4.3 million payment made in early 2019 associated with the termination of a "purported consulting agreement."²² FirstEnergy Corp. identified the counterparty to the agreement as an entity (Sustainability Funding Alliance of Ohio) associated with an individual who subsequently was appointed to regulate the FirstEnergy Utilities. At that time, FirstEnergy Corp. stated "it has not been determined if the payments were for the purposes represented within the consulting agreement."²³ The next day, on November 20, 2020, PUCO Chair Randazzo resigned.

FirstEnergy Corp. filed documents with the United States Securities and Exchange Commission on February 16, 2021. There, FirstEnergy Corp. concluded that the payments under the consulting agreement "may have been for purposes other than those represented within the consulting agreement."²⁴

We also learned in March of 2021, during the OCC deposition of Mr. Fanelli (which the FirstEnergy Utilities fought hard to prevent) that FirstEnergy Service Company made payments, in 2017 to Generation Now (the infamous dark money group involved in the H.B.6 scandal).²⁵ It came out that FirstEnergy Service Company charged approximately \$300,000 of these payments to FirstEnergy's three Ohio utilities.²⁶ And it came out that, in 2018, FirstEnergy Service Company paid \$500,000 to the misleadingly named group called Hardworking Ohioans²⁷ (a dark

²² FirstEnergy Corp. Form 10-Q (Nov. 19, 2020).

²³ FirstEnergy Corp., Form 10-Q (Nov. 19, 2020).

²⁴ FirstEnergy Corp., Form 8-k (Feb. 16, 2021).

²⁵ Deposition of Mr. Santino L. Fanelli at 130-131 (Mar. 9, 2021).

²⁶ *Id.*

²⁷ Deposition of Mr. Santino L. Fanelli at 130 & 164-165 (Mar. 9, 2021).

money group FirstEnergy used to attack Cleveland Public Power).²⁸ And it came out that FirstEnergy Service Company booked a portion of these costs to the Ohio utilities.²⁹

These facts, however, were not disclosed by the FirstEnergy Utilities when they responded to the PUCO's directive³⁰ to show that the costs of any political or charitable spending in support of H.B.6 were not charged to utility customers. *The independent audit we seek should include investigation of FirstEnergy's response to the PUCO.*

And more recently, FirstEnergy Corp. reached a deferred prosecution agreement with the U.S. Attorney where it "admits, accepts, and acknowledges that it is responsible under United States law for the acts as charged in the Information and as set forth in the Statement of Facts" involving the federal crime of honest services wire fraud.³¹ FirstEnergy Corp. admitted that it "paid \$4.3 million dollars to Public Official B [the former PUCO Chair] through his consulting company in return for Public Official B performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp's interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose."³²

The PUCO should act now to protect consumers by ordering a full, independent audit in this proceeding, with hiring of the auditor and oversight by an independent panel.

²⁸ Tobias, A., *FirstEnergy says it charged customers for improper expenses, pledges to end its dark money political spending* (Feb. 18, 2021).

²⁹ Deposition of Mr. Santino L. Fanelli at 130-131 (Mar. 9, 2021).

³⁰ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC, Response to Show Cause Entry (Sept. 30, 2020).

³¹ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 1 (July 22, 2021).

³² *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 22, 2021).

II. ARGUMENT

A. **The PUCO should arrange for an independent auditor to investigate and audit issues affecting utility consumers relating to the political and so-called charitable activity of FirstEnergy entities related to tainted H.B.6.**

The PUCO should arrange for an independent auditor to investigate and audit for consumer protection in this case. Reasons are as follows.

Mr. Fanelli was called upon by the FirstEnergy Utilities to address the PUCO's inquiries. His conclusion for the PUCO was that "[t]he Companies have not included, directly or indirectly, any H.B.6 costs in rates or charges paid by ratepayers in Ohio."³³

But shockingly, it was revealed at Mr. Fanelli's deposition – *the OCC deposition that the FirstEnergy utilities tried hard to prevent* – that he did no actual review of accounting records to reach his affidavit conclusion. Instead, OCC learned that he simply conducted a "conceptual review" as to whether the political spending *should* ever be included in rates. He described his review as follows:

The approach for the affidavit was conceptual and to review the Companies' calculations of their rates, riders, and charges compared to the accounts in which the costs of political and charitable spending are to be recorded. Concluded based on that conceptual review there shouldn't be new costs of political or charitable spending that is impacting customer rates. Tr. at 206.

And, as stated above, the result of Mr. Fanelli's "conceptual" affidavit was also a function of the PUCO allowing the FirstEnergy Utilities to, in essence, investigate themselves through the affidavit.

OCC's concern about the FirstEnergy Utilities essentially being allowed to investigate themselves in this PUCO case is a theme in a federal case where United States District Judge

³³ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC, Response to Show Cause Entry (Sept. 30, 2020).

Marbley recently ruled. The federal Judge emphasized the importance of an independent and disinterested review that must take place (in a shareholder derivative suit against officers of FirstEnergy).³⁴ (See attached District Court Order, Attachment 5). There the Judge denied FirstEnergy's request for a stay on discovery, finding that FirstEnergy spent months allowing the former FirstEnergy officers to *investigate themselves* under the auspices of an Independent Review Committee. The federal Judge stated that FirstEnergy "cannot have thought this committee to be a valid substitute" for an "independent and disinterested" special litigation committee.³⁵

It cannot be over-emphasized that the parent corporation of the FirstEnergy Utilities, FirstEnergy Corp., is the company who "admits, accepts, and acknowledges that it is responsible under United States law for the acts as charged in the Information and as set forth in the Statement of Facts" involving the federal crime of honest services wire fraud.³⁶ Not to mention that FirstEnergy's CEO during much of the activity at issue has been fired, along with other executives. The OCC deposition and "conceptual" affidavit highlight the problems with the limited, self-policing review conducted by the FirstEnergy Utilities in this case. The problems are only compounded by the lack of an independent auditor.

We also learned through filings made at the SEC that FirstEnergy Service Company had over a ten-year period misallocated costs to FirstEnergy's regulated utilities, including the Ohio

³⁴ *Employees Retirement System of the City of St. Louis v. Charles E. Jones*, Case No. 2:20-cv-4813, Opinion & Order on Motion to Stay (Oct. 20, 2021).

³⁵ *Id.* at 6.

³⁶ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 1 (July 22, 2021).

utilities.³⁷ And it was learned that this public disclosure was a result of an ongoing internal investigation being conducted by FirstEnergy Corp.'s independent board of directors. It's an investigation where the investigative report produced by FirstEnergy Corp.'s Board is being kept from OCC by FirstEnergy and by the PUCO that declined to order FirstEnergy to produce the investigative report for OCC.³⁸ Of course, FirstEnergy documents that are denied to OCC are documents that, in essence, are denied for the PUCO's consideration in resolving this case.

Indeed, we did not know that the misallocations included the \$4.3 million consulting contract payments until Counsel for FirstEnergy Utilities admitted such during the deposition of Mr. Fanelli.³⁹ This was borne out by the recent audit report in Case No. 20-1629-EL-RDR.⁴⁰ And it was not until recently that the FirstEnergy Utilities, following the filing of that audit report and the deferred prosecution agreement, admitted that the \$4.3 million consulting payments to the former PUCO chair were political spending in support of H.B.6.⁴¹

The PUCO itself acknowledged the importance of an investigation into these matters by hiring independent auditors for the investigations into FirstEnergy's corporate separation practices and the use of distribution modernization rider revenues. It also expanded its existing audit of the delivery capital recovery rider to include an audit of vendor payments that

³⁷ FirstEnergy Corp. Form 10-K (Feb. 18, 2021).

³⁸ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Prehearing Conference Transcript at 24 (Aug. 31, 2021).

³⁹ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Deposition Transcript of Santino Fanelli at 195-196 (Mar. 9, 2021).

⁴⁰ *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of FirstEnergy*, Case No. 20-1629-EL-RDR, Compliance Audit Expanded Scope (Aug. 3, 2021).

⁴¹ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Motion for Leave to file a Supplemental Response to the September 15, 2020 Show Cause Entry, Response at 1-2 (Aug. 6, 2021).

FirstEnergy Corp. identified as “either improperly classified, misallocated***or lacked supporting documentation.”⁴²

The PUCO should arrange for an auditor, for finding the truth and protecting the Ohio public.

B. The PUCO should appoint an independent committee to hire the auditor and oversee the independent investigation and audit.

The PUCO should arrange for the hiring and oversight of the auditor by an independent committee. This arrangement is important for fairness (due process) and for public confidence in their state government, given recent revelations about the handling of other PUCO audits and the backdrop of the FirstEnergy/government scandal. Some history is in order, as follows.

In another FirstEnergy investigation, we learned information in text messages between former (fired) FirstEnergy CEO Chuck Jones and former (fired) FirstEnergy Senior VP Dennis Chack. We learned that, in the view of CEO Jones, the former PUCO Chair had a role in “burning” the final audit report by the PUCO-appointed Auditor (Oxford Advisors).

The FirstEnergy text messages partly came to light through the U.S. Attorney’s Deferred Prosecution Agreement with FirstEnergy and as a result of the FirstEnergy Corp. Board’s investigation. And then the full text message recently (September 28, 2021) was revealed as a result of OCC’s June 25, 2021 subpoena to FirstEnergy Corp. (and after resolution of FirstEnergy’s Motion to Quash OCC’s subpoena and claim of confidentiality). That subpoena was part of OCC’s discovery in the corporate separation and delivery capital recovery rider investigations.

⁴² *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 at ¶6-8 (Mar. 10, 2021).

The federal Deferred Prosecution Agreement contained this partial version of the text message from former FirstEnergy CEO Chuck Jones to former FirstEnergy Senior VP Dennis Chack:

“He [the former PUCO Chair] will get it done for us but cannot just jettison all process.” There is “a lot of talk going on in the halls of PUCO about does he work there for us? He’ll move it as fast as he can.”⁴³

OCC more recently obtained the full text message from FirstEnergy via subpoena (and through a process for FirstEnergy to relinquish its claim of confidentiality). The text message is from former FirstEnergy CEO Chuck Jones to former FirstEnergy Senior VP Dennis Chack.

Here is the message:

He [the former PUCO Chair] will get it done for us but cannot just jettison all process. Says the combination of overruling Staff and other Commissioners on decoupling, getting rid of SEET and **burning** the DMR final report has a lot of talk going on in the halls of the PUCO about does he work there or for us? He’ll move it as fast as he can. Better come up with a short term work around.⁴⁴
(See Attachment 1)

In this regard, on February 26, 2020, PUCO Chair Sam Randazzo and other Commissioners announced a mystifying change of plans whereby Oxford’s final audit report would *not* be filed. An interim audit report from Oxford was filed earlier and it contained interesting information about the DMR money collected from consumers: “[d]ollars collected by OH Utilities, including dollars collected through Rider DMR, are contributed to the Regulated Money Pool” and “[b]y moving the Rider DMR funds into the Ohio Utilities Regulated Money

⁴³ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 43 (July 22, 2021).

⁴⁴ *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 4901:1-37*, Case No. 17-974-EL-UNC, Documents produced by FirstEnergy Corp. in response to OCC subpoena, Doc. No. 0000072 (March 4, 2020) (Emphasis added).

Pool – other non-OHIO regulated companies have borrowing access to the Rider DMR funds.”⁴⁵ (More recently, the PUCO hired a new auditor, Daymark, to produce an audit report in this case involving the distribution modernization rider.)

Also, we became aware of the PUCO Staff’s questionable handling of another PUCO-ordered investigation having to do with the audit of AEP’s OVEC coal plant charges (subsidies) that its consumers were made to pay. There, a finding for consumer protection in a PUCO auditor’s draft report was deleted to accommodate pro-utility changes supported by the PUCO Staff and AEP. Emails involving the PUCO Staff, the auditor and AEP are attached as Attachments 2 and 3 (as obtained via public records requests and discovery).

The PUCO Staff had emailed its auditor (for auditing AEP’s OVEC subsidy charges to consumers).⁴⁶ The PUCO Staff encouraged the auditor to use a “milder tone and intensity.” *The auditor then proceeded to delete a key conclusion for consumer protection: that “keeping the plants running does not seem to be in the best interests of the ratepayers.”* (See Attachment 2 with September 8, 2020, 2:59 p.m. email from Mahilia Christopher of PUCO Staff to Marie Fagan of LEI.) The PUCO Staff’s email also states: “Staff still needs final acquiescence from PUCO Admin. regarding the overall tone of the draft report!”

And, in an email from AEP to the auditor (Attachment 3), AEP’s counsel stated that:

Glad to hear you are deleting that sentence because we had a similar comment –such an observation is beyond the scope of the audit and as a FERC-approved agreement is beyond the scope of the Commission’s authority. The prudence issues involved in the audit relate to AEP Ohio’s implementation of the ICPA and not the existence of it. Thanks.

⁴⁵ *In the Matter of the 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 Advisors Mid-Term Report at 17 (June 14, 2019).

⁴⁶ Email from M. Christopher to Marie Fagan (Sept. 8, 2020).

OCC, the state’s consumer advocate, was excluded from this *private case process* among the PUCO, the auditor, and AEP – which only was revealed through public records requests and discovery.

And emails that OCC obtained through a public records request in the FirstEnergy corporate separation investigation are indicative of the PUCO Staff limiting the scope of the corporate separation audit. There, the PUCO Staff appears to have derailed an investigation into whether H.B.6 costs were charged to customers of the FirstEnergy Utilities. In the emails disclosed to OCC, there are communications exchanged between the potential auditing contract bidders and the PUCO Staff where the potential bidders asked about the scope of the proposed corporate separation audit.

In response to several auditor-candidate inquiries on this matter, the PUCO Staffer explained as follows: *this is a “traditional corporate separation audit” with no testing to determine whether the source of funds of political and charitable spending for H.B.6 was from rates or charges paid by Ohio customers.*⁴⁷ The PUCO Staff sent this audit-limiting message to auditor candidates despite the fact that the PUCO had ordered “an additional corporate separation audit which includes examination of the time period leading up to the passage of Am. Sub. H.B.6 and the subsequent referendum.”⁴⁸ As a result, the issue of whether H.B.6 costs were charged to customers of the FirstEnergy Utilities will not be the subject of any audit by a PUCO-hired independent auditor. The PUCO’s approach is not a way to obtain facts.

⁴⁷ Attachment 4 (emphasis added).

⁴⁸ *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.* Entry at ¶1 (Nov. 4, 2020).

This case presents a most unusual situation where the former PUCO Chair has been connected by the federal government to some matters relating to the investigation of FirstEnergy. According to the deferred prosecution agreement, FirstEnergy Corp. paid \$4,333,333 to an entity owned and controlled by the former PUCO chair, which FirstEnergy was not under a legal obligation to pay.⁴⁹

According to the “true and accurate” Statement of Facts, agreed to by FirstEnergy Corp. in the Deferred Prosecution Agreement, FirstEnergy Corp.’s \$4.3 million payment (ultimately for PUCO Chair Randazzo) was for a certain intent. There it was said that FirstEnergy Corp. paid the money “with the intent and for the purpose that, in return, Public Official B [the former PUCO Chair] would perform official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”⁵⁰

Given the above history of the PUCO and audits, an external independent auditor should be hired and overseen by an independent committee – meaning independent of the PUCO and its Staff. The external auditor should include in its investigation whether Mr. Fanelli’s affidavit made a full and accurate disclosure of all political and charitable spending that may have been charged to FirstEnergy’s utility customers.

The PUCO has taken a similar step before in cases of great public importance. One example is the PUCO’s review of the cost overruns from FirstEnergy’s Perry nuclear plants.⁵¹ There the PUCO approved, consistent with the terms reached under a Stipulation, an audit advisory panel,

⁴⁹ Deferred Prosecution Agreement, Statement of Facts at page 35.

⁵⁰ Deferred Prosecution Agreement at page 35.

⁵¹ *In the Matter of the Investigation into the Perry Nuclear Power Station*, Case No. 85-521-EL-COI et al., Opinion and Order at 162-164 (Jan. 31, 1989).

comprised of representatives of IEC, OCC, and Centerior whose function and purpose was to select an independent auditing firm; determine the cost, scope and depth of the audit; to monitor and facilitate the progress of the audit and establish an audit completion date.⁵² The audit was to be a comprehensive and exhaustive review of the management operations of Centerior Service Corporation and the Ohio utilities, directed toward improving operating efficiencies and cost reductions.⁵³

The PUCO also used an audit with a public process in a Columbia Gas case where the PUCO found a “lack of diligence in seeking out Ohio produced gas.”⁵⁴ There the PUCO ordered an audit of Columbia’s purchasing practices *with a ten-member public advisory committee to “enhance the audit process and provide meaningful public participation.”*⁵⁵ Ultimately and dramatically, the PUCO ordered changes in Columbia’s Board.⁵⁶

Another example of an in-depth management audit ⁵⁷ with a public process involved General Telephone. ⁵⁸ There, in response to concerns over the number and nature of consumer complaints, the PUCO ordered a management audit of General’s practices and policies affecting quality of service. The PUCO staff and OCC discussed the results of the investigation and agreed

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *In the Matter of the Investigation Into the Gas Purchasing Practices and Policies of Columbia Gas of Ohio, Inc.*, Case No. 83-135-GA-COI, Opinion and Order at 21-22 (May 18, 1983).

⁵⁵ *See, id.*, Opinion and Order at 21 (Oct. 8, 1985) and describing the Public Advisory Committee as serving “a very necessary and beneficial function.” (Emphasis added)

⁵⁶ *Id.* at 16 (ordering an independent board of directors with the majority of the directors living or working in the utility’s service territory, and not being employees or associated with the utility).

⁵⁷ *In the Matter of the Commission Investigation into Management Practices and Policies of the General Telephone Company*, Case No. 85-1969-TP-COI.

⁵⁸ *In the Matter of the Application of General Telephone Company of Ohio for Authority to Increase and Adjust its Rates*, Case No.84-1026-TP-AIR, Opinion and Order at 73 (July 23, 1985).

that the utilities should file a plan for implementing the audit recommendations, followed by OCC and the Staff commenting on the utilities' plan.⁵⁹

An independent review committee is warranted here because, among other things, the case presents important questions about the integrity of the state's regulatory process that exists to protect the Ohio public. Establishing an independent review committee would help assure for the public that the independent investigation and the audit are being done thoroughly and with independent oversight and supervision.

The PUCO should order that the audit committee will hire and oversee the auditor in activities related to the audit investigation. The audit committee members should: be from outside the PUCO; independent from utilities and politics; sensitive to consumer issues, transparency and fairness (due process); and should meet on a regular basis related to the audit.

III. CONCLUSION

For the protection of FirstEnergy's two million residential utility consumers, the PUCO should grant OCC's motions for the reasons stated above.

⁵⁹ *In the Matter of the Application of GTE North Inc. for Authority to Adjust its Rates and charges, et al.*, Opinion at 9 (Oct. 28, 1988).

Respectfully submitted,

Bruce Weston (#0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis, Senior Counsel
Counsel of Record (# 0020847)
John Finnigan (#0018689)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Willis]: (614) 466-9567
Telephone [Finnigan] (614) 466-9585
maureen.willis@occ.ohio.gov
john.finnigan@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the Revised Motion for an Auditor was served upon the persons listed below via electronic transmission this 27th day of October 2021.

/s/ Maureen R. Willis
Maureen R. Willis
Senior Counsel

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

SERVICE LIST

werner.margard@ohioAGO.gov
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leslie.kovacik@toledo.oh.gov
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evan.betterton@igs.com
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Donadio@carpenterlipps.com

Attorney Examiner:

Gregory.price@puco.ohio.gov
Megan.addison@puco.ohio.gov
Jacqueline.st.john@puco.ohio.gov

Short Message Report

Conversations: 1	Participants: 2
Total Messages: 5	Date Range: 3/4/2020

Outline of Conversations



NODISPLAY 5 messages on 3/4/2020 • Charles Jones • Dennis Chack

At the PUCO's request, OCC has redacted the "confidential" label that appears on this document received from FirstEnergy Corp., as the document ultimately was deemed not confidential by the sender.

Messages in chronological order (times are shown in GMT -05:00)



NODISPLAY

- CJ **Charles Jones** 3/4/2020, 2:57 PM
He will get it done for us but cannot just jettison all process. Says the combination of over ruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us? He'll move it as fast as he can. Better come up with a short term work around.
- DC **Dennis Chack** 3:05 PM
Ok thanks for discussing with him. How are you feeling
- CJ **Charles Jones** 3:09 PM
[REDACTED] Stopped by Sam's today on my walk. He has friends down and has been busy but he was out doing some yard work. Walking about 3 miles a day right now. A little bored since I cant golf or even get in the pool. But better than sitting in Ohio. Weather has been beautiful last 3 days.
- DC **Dennis Chack** 3:14 PM
It was not the best the days we were there
- CJ **Charles Jones** 3:14 PM
I know. Pretty chilly and windy.

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From: Marie Fagan
To: Christopher, Mahila
Cc: Windle, Rodney
Subject: RE: Draft AEP Ohio OVEC Audit
Date: Tuesday, September 8, 2020 3:42:14 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image007.png

Okay, thanks v much for the head start

From: mahila.christopher@puco.ohio.gov <mahila.christopher@puco.ohio.gov>
Sent: Tuesday, September 8, 2020 2:59 PM
To: Marie Fagan <marie@londoneconomics.com>
Cc: rodney.windle@puco.ohio.gov
Subject: RE: Draft AEP Ohio OVEC Audit

Hi Marie,
Please find attached Staff's initial comments on LEI's latest draft of the AEP Ohio, 2018-2019 PPA rider audit final report. This may help you get a head start on Staff's editorial suggestions. The comments can be discussed further at tomorrow's meeting.

**If you could please note that Staff still needs final acquiescence from PUCO Admin. regarding the overall tone of the draft report!

Staff's main observation regarding the tone of the draft is the following:

- Milder tone and intensity of language would be recommended such as the language on page 10, para 3: "Therefore, keeping the plants running does not seem to be in the best interests of the ratepayers"
- Reduced subjectivity and level of detail/specifics would be required such as the language on page 26, para 2: "HB 6 also provides subsidies for two large nuclear power plants in Ohio, and for that reason is the center of a federal bribery investigation. First Energy Corporation and the company's political action committee, and Generation Now, a 501 (c) (4) non-profit group are charged with paying \$60 million to advocate for the passage of HB 6. The case has led to federal charges against Ohio House Speaker Larry Householder and four associates."

I am attaching a redlined Word version of the draft for your perusal/review. If you could, please take a look and incorporate Staff's comments as far as possible? Please let me know of any questions, comments, and concerns.

Thank you

Mahila Christopher
Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov


This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

From: Christopher, Mahila
Sent: Tuesday, September 8, 2020 1:09 PM
To: Marie Fagan <marie@londoneconomics.com>
Cc: Windle, Rodney <rodney.windle@puco.ohio.gov>
Subject: RE: Draft AEP Ohio OVEC Audit

Hi Marie-

As per the RFP, the Final Report is due to be filed on the 16th of September:

1. Audit Proposals Due February 28, 2020
2. Award Audit March 11, 2020
3. Audit Conducted March 11, 2020 through September 1,
4. 2020 Draft Audit Report Presented to Staff September 1, 2020
5. Final Audit Report Filed with Commission September 16, 2020

Should Staff reach our edits to LEI by 2:00pm today, would it be possible for LEI to send an updated draft to the Company tomorrow?

Thank you

Mahila Christopher
Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov


This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

From: Marie Fagan <marie@londoneconomics.com>
Sent: Tuesday, September 8, 2020 12:29 PM
To: Christopher, Mahila <mahila.christopher@puco.ohio.gov>
Cc: Windle, Rodney <rodney.windle@puco.ohio.gov>
Subject: RE: Draft AEP Ohio OVEC Audit

Okay, will do. Once we have your comments I'll have a good idea of how long it will take to address them, but I would guess we can complete it by the end of the week in any case, and likely sooner than that. So that means we can get the draft to Ed by this Friday 11th or maybe a day or so sooner, at least in electronic format. I think that the week that Ed wants for AEP Ohio review is reasonable, which means that they would get their review back to us by about Sept 18.th We would then address their comments (again, that should take a day or so, unless comments are extensive). Then we would provide you with the final report including workpapers the week of Sept. 21.

Best,
Marie

From: mahila.christopher@puco.ohio.gov <mahila.christopher@puco.ohio.gov>
Sent: Tuesday, September 8, 2020 9:32 AM

To: Marie Fagan <marie@londoneconomics.com>
Cc: rodney.windle@puco.ohio.gov
Subject: FW: Draft AEP Ohio OVEC Audit
Importance: High

Hi Marie,
Staff should be able to communicate our comments on the draft by tomorrow's meeting.
If you could, please assess Edward's question based on this and let me know if you have any concerns with his request for a week to review the draft for confidentiality and factual inaccuracies?

Thank you

Mahila Christopher
Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov


This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

From: Edward J Locigno <ejlocigno@aep.com>
Sent: Tuesday, September 8, 2020 9:19 AM
To: Marie Fagan <marie@londoneconomics.com>
Cc: Andrea E Moore <aemoore@aep.com>; Christopher, Mahila <mahila.christopher@puco.ohio.gov>; Shelli A Sloan <sasloan@aep.com>; Steven T Nourse <stnourse@aep.com>
Subject: RE: Draft AEP Ohio OVEC Audit
Importance: High

Mahila/Marie

When can we expect the report to review for confidentiality and factual inaccuracies? We need a solid week really at least to review it. Please let me know. Thank you!



EDWARD J LOCIGNO | REGULATORY ANALYSIS & CASE MGR
EJLOCIGNO@AEP.COM | D:614.716.3495 | C:614.619.9460
1 RIVERSIDE PLAZA, COLUMBUS, OH 43215

From: Marie Fagan <marie@londoneconomics.com>
Sent: Wednesday, September 2, 2020 3:09 PM
To: Edward J Locigno <ejlocigno@aep.com>
Cc: Andrea E Moore <aemoore@aep.com>
Subject: [EXTERNAL] Draft AEP Ohio OVEC Audit

This is an **EXTERNAL** email. **STOP. THINK** before you **CLICK** links or **OPEN** attachments. If suspicious please click the '**Report to Incidents**' button in Outlook or forward to incidents@aep.com from a mobile device.

Dear Ed,
This is to confirm that LEI provided the draft OVEC audit report to the Commission Staff. The process now, as I understand it, is that Staff will review, and after that we will provide it to AEP Ohio for redacting. At that time, we can talk about a secure way to provide it to you, perhaps uploading to the data room.
Thank you for all your help with the audit.
Best,
Marie



Marie N. Fagan, PhD
Chief Economist
London Economics International
717 Atlantic Ave, Suite 1 A | Boston, MA | 02111
Direct: 1-617-933-7205
Cell 1-617-599-9308
www.londoneconomics.com

London Economics International, LLC ("LEI") is an economic and financial consulting company with two decades of experience advising both private and public entities in energy and infrastructure markets. LEI publishes bi-annual market reviews of all US and Canadian regional power markets available at www.londoneconomicspress.com.

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From: Christopher, Mahila
To: Marie Fagan
Cc: Windle, Rodney
Subject: RE: an edit needed for AEP Ohio OVEC final audit report
Date: Friday, September 11, 2020 1:58:00 PM
Attachments: [image003.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)

Hi Marie,
Thank you for the heads up. Staff would recommend that you share this proposed edit with the Company as well.

Let me know if you have any questions.

Mahila Christopher

Public Utilities Commission of Ohio
Office of the Federal Energy Advocate
Utility Specialist
(614) 728-6954
www.PUCO.ohio.gov



This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

From: Marie Fagan <marie@londoneconomics.com>
Sent: Friday, September 11, 2020 12:17 PM
To: Christopher, Mahila <mahila.christopher@puco.ohio.gov>
Cc: Windle, Rodney <rodney.windle@puco.ohio.gov>
Subject: an edit needed for AEP Ohio OVEC final audit report

Hi Mahila,
I just realized there was an edit I wanted to make to page 10, where we said "However, LEI's analysis shows that the OVEC contract overall is not in the best interest of AEP Ohio ratepayers." that I missed in the last version of the report. I'll edit it when we get the version back from AEP Ohio next week-- I'll delete that sentence and tinker with the rest of the paragraph so it reads smoothly.
Best,
Marie



Marie N. Fagan, PhD
Chief Economist
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Edward J Locigno

From: Steven T Nourse
Sent: Friday, September 11, 2020 3:05 PM
To: Marie Fagan; Edward J Locigno
Cc: Andrea E Moore; Shelli A Sloan; Michael W McCulty
Subject: RE: edit proposed to AEP Ohio OVEC audit report

Glad to hear you are deleting that sentence because we had a similar comment – such an observation is beyond the scope of the audit and as a FERC-approved agreement is beyond the scope of the Commission’s authority. The prudence issues involved in the audit relate to AEP Ohio’s implementation of the ICPA and not the existence of it. Thanks



STEVEN T NOURSE | VP-LEGAL
STNOURSE@AEP.COM | D:614.716.1608
1 RIVERSIDE PLAZA, COLUMBUS, OH 43215

From: Marie Fagan <marie@londoneconomics.com>
Sent: Friday, September 11, 2020 2:18 PM
To: Edward J Locigno <ejlocigno@aep.com>
Cc: Andrea E Moore <aemoore@aep.com>; Shelli A Sloan <sasloan@aep.com>; Michael W McCulty <mmcculty@aep.com>; Steven T Nourse <stnourse@aep.com>
Subject: [EXTERNAL] edit proposed to AEP Ohio OVEC audit report

This is an **EXTERNAL** email. **STOP. THINK** before you **CLICK** links or **OPEN** attachments. If suspicious please click the '**Report to Incidents**' button in Outlook or forward to incidents@aep.com from a mobile device.

Dear Ed,
I just realized there was an edit I wanted to make to page 10, where LEI said “However, LEI’s analysis shows that the OVEC contract overall is not in the best interest of AEP Ohio ratepayers.” that I missed. I’ll edit it when we get the doc back from you next week. I’m going to delete that sentence and tinker with the rest of the paragraph so it reads smoothly.
Best,
Marie

At the PUCO's request, OCC has redacted the "confidential" label that appears on this document received from AEP, as the document ultimately was deemed not confidential by the sender.



Marie N. Fagan, PhD
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Cell 1-617-599-9308
www.londoneconomics.com

From: [Mccarter, Doris](#)
To: [Fieldman, Alyson](#)
Cc: [Wiefling, Guler Ann](#); [Molter, Lindsey](#)
Subject: RE: RFP Clarification Questions
Date: Friday, November 20, 2020 9:30:00 AM

Hello Everyone,

The Order language was just to give background around various other proceedings occurring at the PUCO. That text refers to another case. The audit that will be the subject of this case is a traditional corporate separation audit.

I need an overall cost (cap) from you. However, I will still need that broken down by specific task areas, hours per tasks, person/cost per hour per task. Such a breakdown informs me as to the level of effort going into the audit, the areas of effort, the competencies engaged in the areas of review and also your understanding of/approach to the audit.

The hearing costs can be delineated as a per hour charge, since it is unknown if a further proceeding will be needed. Please be certain to make it a separate section of your bid.

Doris E. McCarter

Grid Modernization and Retail Markets Division
Rates and Analysis Department
Public Utilities Commission of Ohio
180 East Broad Street, 3rd Floor
Columbus, Ohio 43215
Doris.mccarter@puco.ohio.gov

From: Fieldman, Alyson <Alyson.Fieldman@marcumllp.com>
Sent: Friday, November 20, 2020 8:36 AM
To: Mccarter, Doris <doris.mccarter@puco.ohio.gov>; Molter, Lindsey <Zee.Molter@puco.ohio.gov>
Cc: Wiefling, Guler Ann <Guler.Wiefling@marcumllp.com>
Subject: RFP Clarification Questions

Good morning, Ms. McCarter and Ms. Molter,

Marcum LLP will be submitting a proposal in response to the RFP that PUCO has issued as it relates to an audit / investigation of First Energy Corp. We understand from the RFP that one of the engagement's purposes will be to review the company's compliance with the Corporate Separation Rules adopted by PUCO.

Paragraph 15 of the order that PUCO issued on 11/4/2020 regarding this RFP, states that PUCO has "opened proceedings to review whether any political and charitable spending by the Companies in support of Am. Sub. H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state." The RFP, however, does not explicitly include this as an objective of the work to be undertaken by the selected auditor. Does PUCO wish the selected auditor to conduct tests in order

to determine whether such contributions were directly or indirectly paid by ratepayers?

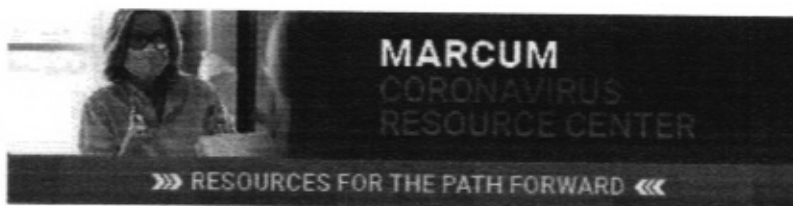
Separately, the RFP on page 2 states that "the proposed costs shall be considered firm prices for performing the work described in the proposal." Can you please clarify whether PUCO is asking for a fixed price for this engagement or whether it is asking for hourly rates by level of resource with such rates remaining constant for the duration of the engagement?

Thank you for your time and we look forward to your response.

Kind regards,
Alyson

Alyson Fieldman
Chief Marketing Strategy Officer
6685 Beta Drive
Mayfield Village, OH 44143
P: (440) 459-5969
C: (352) 642-3884
Alyson.Fieldman@marcumllp.com
[LinkedIn](#)

MARCUM
ACCOUNTANTS + ADVISORS



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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

EMPLOYEES RETIREMENT SYSTEM OF THE CITY OF ST. LOUIS, <i>et al.</i>,	:	
	:	
	:	
Plaintiffs,	:	Case No. 2:20-cv-4813
	:	
v.	:	Chief Judge Algenon L. Marbley
	:	
CHARLES E. JONES, <i>et al.</i>,	:	Magistrate Judge Kimberly A. Jolson
	:	
Defendants.	:	

OPINION & ORDER ON MOTION TO STAY

This matter is before the Court on a Motion to Stay by nominal Defendant FirstEnergy Corp. (“FirstEnergy,” or the “Company”). (ECF No. 120). The Court has determined that it can resolve this Motion on the papers and without oral argument. For the reasons that follow, this Motion is **DENIED**.

I. BACKGROUND

The Court set out the factual history of this case in its May 11, 2021 Opinion and Order (ECF No. 93), which denied Defendants’ Motion to Dismiss. The Court incorporates those facts as if fully set forth herein.

This case is a consolidated shareholder derivative action based on an alleged bribery, racketeering, and pay-to-play scheme perpetrated by FirstEnergy and its senior officers and directors. Plaintiffs allege that, between 2017 and 2020, Defendants paid more than \$60 million in illegal contributions to Ohio public officials, including Speaker of the House Larry Householder, in exchange for favorable legislation designed to bail out the Company’s failing nuclear power plants. (*Id.* at 2). The individual Complaints were filed between September and November 2020. Pursuant to a consolidation order, the operative Complaint was filed on January 25, 2021. (ECF

No. 75).

In denying Defendants' Motion to Dismiss, the Court found that "Plaintiffs make extensive and detailed allegations suggesting that the FirstEnergy Defendants issued numerous false or misleading statements through the proxies, and they provide ample reasons as to why the statements misled shareholders. Extensive facts, outlined in the Consolidated Complaint, support their position." (ECF No. 93 at 17). On June 14, 2021, following the Court's Opinion and Order on the Motion to Dismiss, the Court lifted its automatic stay and ordered that "discovery may commence." (ECF No. 98 at 1).

Several weeks later, FirstEnergy formed a Special Litigation Committee ("SLC"). (ECF No. 120-1 at 2). FirstEnergy then filed this Motion on July 20, 2021, seeking a new stay of discovery for six months so the SLC can "evaluate this suit and make a determination with respect to the potential claims asserted by Plaintiffs on behalf of FirstEnergy." (ECF No. 120 at 1).

II. APPLICABLE LAW

As a general matter, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants." *Landis v. No. Am. Co.*, 299 U.S. 248, 254 (1936). "[E]ntry of such an order ordinarily rests with the sound discretion of the District Court." *Ohio Envtl. Council v. U.S. Dist. Ct., S. Dist. of Ohio*, 565 F.2d 393, 396 (6th Cir. 1977).

Consistent with these principles, courts generally grant SLCs a short stay of discovery "in the absence of special circumstances" so the SLC can evaluate the suit and determine the company's interest. *In re Big Lots, Inc. S'holder Litig.*, 2017 WL 2215461, at *5 (S.D. Ohio May 19, 2017) (Jolson, M.J.) (quoting 2 Principles of Corporate Governance § 7.06 (Am. Law Inst. 1994)). *See also, e.g., In re InfoUSA, Inc. S'holders Litig.*, 2008 WL 762482, at *2 (Del. Ch. Mar.

17, 2008) (“Thus, this Court has routinely granted reasonable stays to allow SLCs to complete their investigations.”); *In re Gas Natural, Inc.*, 2015 WL 3557207, at *25 (N.D. Ohio June 4, 2015) (quoting *InfoUSA*) (report & recommendation adopted).¹ Often, courts reason that such stays are consistent with “the inherent right of the board of directors to control and look to the well-being of the corporation in the first instance.” *Kaplan v. Wyatt*, 484 A.2d 501, 510 (Del. Ch. Nov. 5, 1984), *aff’d*, 499 A.2d 1184 (Del. 1985).²

A stay is not, however, given universally as a matter of course. Many courts—including this one—have recognized exceptions for “special circumstances.” *See, e.g., Big Lots*, 2017 WL 2215461, at *5; *Grafman v. Century Broad. Corp.*, 743 F. Supp. 544, 548 (N.D. Ill. July 3, 1990) (“Nevertheless, the corporation’s power to investigate derivative claims does not translate into an absolute right to halt all related proceedings. It is the duty of the courts to insure that the corporation’s investigation is not a mere artifice for delay. In order to discharge its duty, the court must ascertain among other things (1) when Century’s committee began its investigation, (2) how long this investigation should take, (3) what discovery Grafman would like to have in the interim, (4) whether such discovery would interfere with the committee’s investigation.”) (internal citation omitted); *Strougo on Behalf of Brazil Fund, Inc. v. Padegs*, 986 F. Supp. 812, 815 (S.D.N.Y. Dec.

¹ Plaintiffs rely on a further statement in *Landis* that “the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.” 299 U.S. at 255 (1936). This essentially flips the presumption in *Big Lots*, 2017 WL 2215461. However, the quoted passage in *Landis* concerned *staying one case in favor of another*. The very next sentence reads: “Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.” *Landis*, 299 U.S. at 255. This is not such a case. FirstEnergy does not seek to stay this matter in favor of another—though Defendants did previously attempt to do so. *See* ECF No. 48 (Motion to Stay pending a decision from the Northern District of Ohio in *Miller v. Anderson*); ECF No. 59 at 8–9 (Opinion & Order, citing *Landis* and denying same). This stay, if granted, would allow the SLC six months to investigate, after which this case would proceed. The Court therefore declines to follow *In re OM Group, Inc. Derivative Litig.*, No. 1:03-cv-0020 (N.D. Ohio June 20, 2003) (Vecchiarelli, M.J.) (attached as Ex. 3 in ECF No. 127-1) to the extent it relies on *Landis* for the same point of law.

² *But see Crosby v. Beam*, 548 N.E.2d 217, 219 (Ohio 1989) (“A shareholder’s derivative action . . . is an exception to the usual rule that a corporation’s board of directors manages or supervises the management of a corporation.”).

1, 1997) (“Therefore, assuming that a stay would ordinarily be granted, Strougo must show why these circumstances are sufficiently extraordinary to require an exception to the rule.”). And for good reason. If SLCs were entitled legally to stays, as FirstEnergy seems to contend, then corporations could abuse the timing of the SLC’s formation and the speed of its investigation to stall derivative litigation.

Some “special circumstances” that have led courts to deny a stay include: (1) unreasonable delay, such as belated formation of the SLC; (2) long prior stays during the motion-to-dismiss stage; (3) coordinating discovery with parallel cases; and (4) doubts as to the SLC’s independence. *See Big Lots*, 2017 WL 2215461, at *5 (belated formation); *In re MRV Commc’ns, Inc. Derivative Litig.*, 2011 WL 6608642, at *4 (C.D. Cal. Dec. 22, 2011) (unreasonable delay); *OM Group*, ECF No. 127-1, Ex. 3 at 3–4 (belated formation); *Biondi v. Scrushy*, 820 A.2d 1148, 1165 (Del. Ch. Jan. 16, 2003), *aff’d sub nom. In re HealthSouth Corp. S’holders Litig.*, 847 A.2d 1121 (Del. 2004) (independence); *In re Bank of N.Y. Derivative Litig.*, 2000 WL 1708173, at *3 (S.D.N.Y. Nov. 14, 2000) (unreasonable delay, coordination, and independence); *Carlton Inv. v. TLC Beatrice Int’l Holdings, Inc.*, 1996 WL 33167168, at *9 (Del. Ch. June 6, 1996) (prior stay); *In re Storage Tech. Corp. Sec. Litig.*, 804 F. Supp. 1368, 1376 (D. Colo. 1992), *overruled on other grounds by Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246 (10th Cir. 1997) (coordination).

The Delaware courts have, at times, stated the SLC’s stay as more of an entitlement. In *Kaplan*, the Delaware Court of Chancery wrote, in dicta: “It is a foregone conclusion that such a stay must be granted.” 484 A.2d at 510. *See also In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206, 1211 (Del. Ch. July 10, 2002) (“[T]his court has acknowledged its duty to stay derivative actions at the instance of a special litigation committee, pending the investigation and report of the Committee.”) (internal quotation omitted); *Katell v. Morgan Stanley Grp., Inc.*, 1993 WL 390525,

at *4 (Del. Ch. Sept. 27, 1993) (“Delaware law requires that all proceedings in this action be stayed pending the Committee’s investigation.”); *Abbey v. Computer & Commc’ns Tech. Corp.*, 457 A.2d 368, 375 (Del. Ch. Jan. 17, 1983) (“If *Zapata* [*v. Maldonado*, 430 A.2d 779 (Del. 1981)] is to be meaningful, then it would seem that such an independent committee, once appointed, should be afforded a reasonable time to carry out its function. It would likewise seem reasonable to hold normal discovery and other matters in abeyance during this interval.”).

But even in Delaware, there are exceptions. In *Carlton*, the Chancery Court denied a stay pending an SLC investigation, reasoning that “[a] motion for a stay of action by its nature is addressed to the discretion of the trial court with regard particularly to its responsibility to order the discovery process and the timing of the motions and trial practice. It is not something that is subject to mandatory rules of law.” 1996 WL 33167168, at *8. In the process of denying the stay, the court performed “a balancing of the interests of the plaintiff, the interests of the defendant, all with an eye to the efficient and fair administration of the machinery of justice.” *Id.* at *9. Then in *Biondi*, the Chancery Court referenced *Carlton* as “demonstrat[ing] that the general rule favoring stays admits of limited exceptions.” 820 A.2d at 1165 n.42. *See also MRV Commc’ns*, 2011 WL 6608642, at *2–3 (California decision, discussing these cases and denying the SLC’s stay motion).³

Therefore, the Court concludes that the correct standard is that stated in *Big Lots*: “discovery should be stayed [for an SLC investigation] in the absence of special circumstances.” 2017 WL 2215461, at *5 (internal quotation omitted). Though courts often grant stays to SLCs

³ Furthermore, Ohio would not necessarily follow the stricter *Kaplan* line of cases. Ohio has codified the stay procedure in the context of limited liability companies; tellingly, it is permissive, not mandatory. O.R.C. § 1706.613 (“For the purpose of allowing the limited liability company or the series thereof time to undertake an inquiry into the allegations made in the demand or complaint commenced pursuant to sections 1706.61 to 1706.617 of the Revised Code [governing derivative actions by LLC members], the court *may* stay any derivative action for the period the court deems appropriate.”) (emphasis added). The chapter on general corporation law, which naturally predates the LLC chapter, does not outline an SLC stay procedure in the same detail. O.R.C. Ch. 1701.

during the pendency of an investigation, such a stay remains discretionary and may be denied based on special circumstances.

III. ANALYSIS

Returning to the FirstEnergy case, the Court recognizes numerous “special circumstances” that caution against a further stay. None of these necessarily is dispositive; but in combination, they reveal that this is not the ordinary case in which the SLC should receive a stay.

First, there are indications of delay in setting up the SLC. The member cases in this consolidated action all were filed between September and November 2020. The case in the Northern District of Ohio was filed in August 2020. *Miller v. Anderson*, No. 5:20-cv-1743 (N.D. Ohio). The criminal case, RICO class action, and securities fraud class action all broke in July 2020. *United States v. Householder*, No. 1:20-cr-0077 (S.D. Ohio); *Smith v. FirstEnergy Corp.*, No. 2:20-cv-3755 (S.D. Ohio); *Owens v. FirstEnergy Corp.*, No. 2:20-cv-3785 (S.D. Ohio). Yet, FirstEnergy did not authorize the SLC until June 29, 2021. (ECF No. 120-1 at 5). Part of this delay is attributable to finding new independent board members, as the existing board members all were implicated in the various complaints and thus could not serve on an SLC. Those new board members joined FirstEnergy in March and June 2021. (*Id.* at 5–6). But had the SLC been formed even six months earlier—around the time the consolidated Complaint was filed in this action—the stay FirstEnergy now seeks would not have been necessary.

Instead, FirstEnergy spent those months allowing Defendants to investigate themselves under the auspices of an Independent Review Committee. (ECF No. 127 at 7). Defendants cannot have thought this committee to be a valid substitute for an SLC, which must be independent and disinterested. The Court cannot conceive of any reasonable explanation why this committee

proceeded in lieu of naming new board members and setting up the SLC.⁴ Nor could our sister court in the Northern District of Ohio, which last month denied a similar stay motion because “the SLC offers no genuine justification for the delay in its creation.” *Miller v. Anderson*, 2021 WL 4220780, at *1 (Sept. 16, 2021) (appeal filed).

Second, FirstEnergy has received multiple lengthy stays already. An automatic stay, mandated by the Private Securities Litigation Reform Act, was granted in February 2021 and lasted throughout the pendency of Defendants’ Motion to Dismiss. (ECF No. 78). The Court lifted that stay on June 14, 2021. (ECF No. 98). A *de facto* stay followed during the pendency of this present Motion. Plaintiffs represent that Defendants “have not yet produced a single page of discovery” (ECF No. 127 at 9 n.11); and FirstEnergy emphasizes that “discovery has not yet even commenced.” (ECF No. 129 at 1). Taken together, FirstEnergy has received an eight-month stay of discovery—suggesting that the six months they now seek would be “a mere artifice for delay.” *Grafman*, 743 F. Supp. at 548.⁵

Third, discovery is proceeding in the parallel cases. FirstEnergy turned over voluminous documents to the government in connection with the deferred prosecution agreement—many of which are now being produced in response to discovery requests in the RICO class action. (ECF No. 127 at 8 (citing docket entries in *Smith*)). Last month, the Northern District of Ohio denied to stay discovery in its derivative action. *Miller*, 2021 WL 4220780, at *1. And in June, this Court

⁴ FirstEnergy points to *Big Lots*, 2017 WL 2215461, and *InfoUSA*, 2008 WL 762482, for the proposition that an SLC may “be formed shortly after demand was excused, as the [FirstEnergy] SLC was.” (ECF No. 129 at 5). The Court does not suggest that in every case, a corporation that waits through the motion-to-dismiss stage will forfeit the ability to obtain a stay for an SLC. Under these facts, however, where FirstEnergy faced a deluge of lawsuits and evidently recognized the need to investigate, FirstEnergy acted unreasonably by delaying the SLC in favor of its Independent Review Committee. This is one “special circumstance” that differentiates the present case from FirstEnergy’s cited authorities.

⁵ Defendants sought to stay the case even longer. In November 2020, Defendants moved for a stay pending resolution of the motion to dismiss in the Northern District of Ohio. (ECF No. 48). The Court denied that motion. (ECF No. 59). Had it granted the motion, this matter would have been stayed for ten months. *See Miller*, 2021 WL 4220780 (motion to dismiss decided by the Northern District of Ohio in September 2021).

lifted its stay in the securities fraud class action as to documents produced in the other matters. *In re FirstEnergy Corp. Sec. Litig.*, 2021 WL 2414763. Part of the Court’s rationale in lifting the stay was that the plaintiff in that case “could suffer a severe disadvantage in formulating its litigation and settlement strategies” and “could find itself in a significantly different position from most of the other litigants related to this matter.” *Id.* at *6. The same considerations counsel in favor of discovery for Plaintiffs here.

Moreover, this parallel discovery strongly undercuts FirstEnergy’s claims of “significant burden, distraction, and expense of simultaneous discovery.” (ECF No. 129 at 9–10). Despite FirstEnergy’s repeated assertions, this is not a case where “discovery has not yet even commenced.” (ECF No. 129 at 1, 2, 4, 8–9). Simultaneous discovery has begun—just not under this caption—and will continue with or without a stay. This distinguishes the case from, for instance, *Abbey*, 457 A.2d at 375, where no parallel suits are referenced and denying the stay would *cause* simultaneous discovery. Taking the parallel discovery as a given, the marginal time and expense to make it available to Plaintiffs is minimal. Most (if not all) of the documents Plaintiffs initially will seek already have been located, reviewed for responsiveness and privilege, and batched out in other matters. Thus, there is no indication that production here would hinder the SLC in any meaningful way.⁶

When all of these factors are considered in combination, it is clear to the Court that this stay request falls under the exception, not the rule. Ordinarily, an SLC would be permitted to stay discovery pending investigation. Here, however, numerous “special circumstances” counsel


⁶ The Court need not consider a fourth category of special circumstances: doubts as to the SLC’s independence. Plaintiffs indicate that they likely will challenge the SLC if it seeks to dismiss this action. (ECF No. 127 at 16). But that question is not presently before the Court. *Cf. Gas Natural*, 2015 WL 3557207, at *25 (“Judicial economy is served by permitting the independence issue to be addressed after the committee has issued its report.”) (quoting *InfoUSA*, 2008 WL 762482, at *2).

against a stay. *Big Lots*, 2017 WL 2215461, at *5. FirstEnergy delayed setting up the SLC; it has received lengthy stays already; and discovery is active in parallel cases. Therefore, the Court determines that this case cannot lie dormant.

IV. CONCLUSION

For the reasons stated above, FirstEnergy's Motion to Stay pending the SLC's evaluation (ECF No. 120) is **DENIED**. Discovery shall commence without further delay.

IT IS SO ORDERED.



ALGENON L. MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE

DATED: October 20, 2021

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in

Case No(s). 20-1502-EL-UNC

Summary: Motion Revised Motion for an Independent Auditor to Investigate and Audit the Political and Charitable Activity of FirstEnergy Entities Related to Tainted House Bill 6 and Motion for the PUCO to Appoint a Committee Independent of the PUCO to Hire and Oversee the Independent Investigation and Audit by Office of the Ohio Consumers' Counsel - Please note this document was served on parties in its unredacted form on 10/26/2021. After serving parties an unredacted motion yesterday, we were advised that the document had been rejected for filing by PUCO docketing. This revised document, with redactions on attachments 1, 3, and 4, is being filed at the direction of the PUCO. electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.