

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2020 Review of The)
Delivery Capital Recovery Rider of Ohio) Case No. 20-1629-EL-RDR
Edison Company, The Cleveland Electric)
Illuminating Company, and The Toledo)
Edison Company.)

**APPLICATION FOR REHEARING REGARDING PUCO ENTRY
INDEFINITELY DELAYING INVESTIGATION OF FIRSTENERGY
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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January 14, 2022

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The PUCO ruled, on December 15, 2021, that it will investigate FirstEnergy side deals that apparently were not disclosed to OCC despite OCC's lawful request for disclosure in FirstEnergy's infamous 2014 electric security plan case. But the PUCO then indefinitely and inappropriately deferred the investigation of apparent secret FirstEnergy side deals (and OCC's right to investigate). The PUCO ruled that parties such as OCC may not even conduct discovery on the issue.¹ The PUCO claims that it does not want to "interfere" with the United States Attorney's criminal investigation or the Ohio Attorney General's civil case.²

The side deal(s) came into focus in FirstEnergy's Deferred Prosecution Agreement with the U.S. Government. FirstEnergy Corp. is charged with a federal crime.

¹ Entry at para. 14.

² *Id.*

The Deferred Prosecution Agreement requires FirstEnergy to cooperate with government investigations.³

Secret side deals are destructive of the integrity of PUCO decisions under R.C. 4903.09 (and other laws and rules). Those laws and rules require the PUCO to make decisions based on a known record and allow the Ohio Supreme Court to review PUCO decisions with reference to the record.

Inexplicably, the PUCO gives no explanation that supports its belief that allowing discovery of secret side deals would “interfere” with the criminal investigation or the Ohio Attorney General’s civil case. The PUCO’s approach does interfere with OCC’s exercising its rights to discovery and case preparation under R.C. 4903.082 and state rules. And the PUCO’s delay interferes with the search for truth and justice about the FirstEnergy scandals. And the PUCO’s delay interferes with any remedies (for consumers) against FirstEnergy and potentially others if involved in secret side deals involving FirstEnergy consumers’ electric bills.

Justice delayed is justice denied.

This FirstEnergy/PUCO scandal is connected to the FirstEnergy/House Bill 6 scandal. But the PUCO should recognize that the FirstEnergy/PUCO scandal is also a separate scandal and should be investigated as such. At the intersection of these two scandals lies the public interest.

³ *United States of America v. FirstEnergy Corp.*, Case: 1:21-cr-00086-TSB Doc #: 3, Deferred Prosecution Agreement (July 22, 2021) at para. 5.

The current PUCO Chair acknowledged that more transparency is needed to dispel the “black cloud” related to the H.B. 6 scandal.⁴ But there has not been enough transparency or action. The PUCO has repeatedly stated regarding tainted H.B. 6 that it is “determined to act in a deliberate manner, based upon facts rather than speculation.”⁵ However, here the PUCO is unreasonably impeding parties’ efforts to develop the facts.

This case is yet another example of the failure to allow OCC to timely pursue its right to ample discovery, guaranteed by Ohio law (R.C. 4903.082) and PUCO rules (O.A.C. 4901-1-16 et seq.). The Ohio Supreme Court recently affirmed OCC’s broad statutory rights to discovery (as intervenors) when it reversed the PUCO’s ruling that, among other things, denied motions to compel discovery regarding FirstEnergy Advisors.⁶ The Court directed the PUCO to rule on the merits of discovery motions before issuing a decision on the matters before it.

The PUCO has acknowledged that there is information in this docket and the public domain that may demonstrate a violation of Ohio law⁷, triggered by the FirstEnergy Utilities’ failure to disclose side agreements with parties as it is required to do by R.C. 4928.145. ⁸ No hearing has been scheduled in this case. None should be (either in this case or in any other investigation case) until there has been a complete,

⁴ J. Pelzer, *New PUCO Chair Jenifer French: more transparency needed to lift the ‘black cloud’ of [the HB 6 scandal]*, Cleveland.com (May 18, 2021).

⁵ *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).

⁶ *In re Suvon, LLC*, 2021-Ohio-3630.

⁷ Specifically, R.C. 4928.145.

⁸ Entry (December 15, 2021) at para. 8.

thorough, robust investigation into the FirstEnergy Utilities’ potential violations of Ohio law

As stated, the PUCO ruled to indefinitely delay the investigation (its own and parties’) of the FirstEnergy Utilities’ latest revealed misdeeds. The PUCO ruled that parties may not conduct discovery on the issue.⁹ It claims that it does not want to “interfere” with the United States Attorney’s criminal investigation or the Ohio Attorney General’s civil case.¹⁰

The PUCO’s 12/15/21 Entry is unreasonable and unlawful and contrary to parties’ discovery rights as established under Ohio law¹¹ and under the Ohio Administrative Code rules.¹² Accordingly, under R.C. 4903.10, OCC applies for rehearing of the Entry. As explained more fully in the following memorandum in support, the PUCO’s Entry was unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred – in violation of R.C. 4903.082, O.A.C. 4901:1-16 et seq., R.C. 4928.145, R.C. 4903.09, due process, and other authority – by indefinitely delaying its and parties’ (including OCC’s) investigations involving revelation of FirstEnergy’s unreasonable and unlawful failure to disclose (to OCC) apparent secret side deals in Case No. 14-1297-EL-SSO, et al. Time is of the essence for any remedies needed for restitution and protection for FirstEnergy consumers.

⁹ *Id.* at para. 14.

¹⁰ *Id.*

¹¹ R.C. 4903.082.

¹² O.A.C. 4901-1-16 et seq.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING
REGARDING PUCO ENTRY INDEFINITELY DELAYING INVESTIGATION
OF FIRSTENERGY
BY
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I. BACKGROUND

The PUCO has repeatedly stated regarding tainted H.B. 6 that it is “determined to act in a deliberate manner, based upon facts rather than speculation.”¹³ In its Entry, it reiterates its “commitment, with respect to the Companies’ activities surrounding the passage of H.B. 6, to follow the facts wherever they may lead, . . .”¹⁴ The PUCO’s words belie its actions here, which would deny parties rights to discovery) into yet another potential violation of law by the FirstEnergy Utilities.

The PUCO opened a docket for the audit of the FirstEnergy Utilities’ 2020 DCR charge on October 22, 2020. Shortly thereafter, in March 2021, the PUCO expanded the scope of the audit of the FirstEnergy Utilities’ 2020 DCR charge.¹⁵ Based on a filing in that

¹³ *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).

¹⁴ Entry at para. 13.

¹⁵ Case No. 20-1629-EL-RDR, Entry (March 20, 2021).

case by the PUCO Staff,¹⁶ and an Entry by the PUCO itself,¹⁷ the annual audit was expanded to examine tainted H.B. 6 issues. Specifically, after the PUCO Staff reviewed responses to data requests, it concluded that the independent auditor in the 2020 DCR charge audit proceeding should “review . . . transactions to determine whether funds collected from ratepayers were used to pay these vendors and if so, whether or not the funds associated with those payments should be returned to ratepayers as part of the Commission’s review of the Utilities’ delivery capital recovery rider.”¹⁸ The PUCO granted PUCO Staff’s request.¹⁹

In its Entry doing so, the PUCO explained: “Expansion of the scope of the review by the independent auditor in this case to include the disclosed vendor payments is consistent with our commitment to act in a reasoned and methodical manner, based upon facts rather than speculation, in light of the recent allegations surrounding FirstEnergy Corp.” related to House Bill 6.²⁰

Thereafter, the audit in the 2020 DCR charge audit case came out. It stated that FirstEnergy Corp., through the FirstEnergy Utilities, tried to pass through charges to consumers that may have been used to fund its bribery scheme. It did so by improperly charging the FirstEnergy Utilities’ Ohio consumers through the DCR charge for vendor payments that were not approved by the PUCO for collection through the DCR charge.²¹

¹⁶ See Staff Request.

¹⁷ See Entry (March 10, 2021) (granting PUCO’s Staff’s request to expand the audit).

¹⁸ *Id.*

¹⁹ See Entry.

²⁰ Entry at para. 8.

²¹ Expanded Scope Audit at 4.

After the 2020 DCR charge audit came out but before comments on it were filed, the PUCO once again expanded the scope of the 2020 DCR charge audit.²² In his Entry, the Attorney Examiner said:

In this Entry, the attorney examiner requests Staff to direct Blue Ridge Consulting Services, Inc. to expand the scope of the audit in this case to determine if the costs of the naming rights for FirstEnergy Stadium have been recovered from ratepayers by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.²³

Now, the PUCO has expanded the audit (correctly so) for a third time. It explains that “there is information in this docket and in the public domain which may demonstrate a potential violation of the Companies’ obligation to disclose a ‘side agreement’”²⁴ during the FirstEnergy Utilities fourth electric security plan case.²⁵ The “side agreement” discovered was between the FirstEnergy Utilities and the general counsel of IEU-Ohio, principle of Sustainability Funding Alliance, and former PUCO Chair.²⁶ It coincided with IEU-Ohio’s withdraw of its opposition to the settlement proposed in the FirstEnergy Utilities’ fourth electric security plan.²⁷ But there may be more side agreements that surface that were also not disclosed.

The PUCO should include in the scope of its investigation whether there are other undisclosed FirstEnergy side deals. For example, the PUCO should assess the meaning

²² Case No. 20-1629-EL-RDR, Entry (September 29, 2021).

²³ *Id.* at para. 1.

²⁴ *See* Entry at paras. 9-10.

²⁵ Case No. 14-1297-EL-SSO.

²⁶ *See* Entry at paras. 9-10.

²⁷ *See id.*

of the attached FirstEnergy email (obtained by OCC through discovery). The attached FirstEnergy e-mail is regarding “Status of Open Items – Randazzo” in which it is said “Lincoln Electric -We have agreed to the language for the settlement agreement. We now just need to execute the agreement and make payment.”

Unfortunately for consumers, the PUCO inexplicably delays the investigation indefinitely (including parties’ discovery) into the FirstEnergy Utilities’ potential violation of Ohio law. Such indefinite delay is unreasonable and unsupported.

II. MATTERS FOR CONSIDERATION

- A. ASSIGNMENT OF ERROR NO. 1: The PUCO erred – in violation of R.C. 4903.082, O.A.C. 4901:1-16 et seq., R.C. 4928.145, R.C. 4903.09, due process, and other authority – by indefinitely delaying its and parties’ (including OCC’s) investigations involving revelation of FirstEnergy’s unreasonable and unlawful failure to disclose (to OCC) apparent secret side deals in Case No. 14-1297-EL-SSO, et al. Time is of the essence for any remedies needed for restitution and protection for FirstEnergy consumers.**

Without citing to any authority or otherwise explaining itself, the PUCO indefinitely delayed investigation (including parties’ discovery) into the FirstEnergy Utilities’ potential violation of law because it does not want to “interfere” with the ongoing criminal investigation and the Ohio Attorney General’s civil case.²⁸ This is unreasonable because it interferes with parties rights to ample discovery that is guaranteed by Ohio law and the Ohio Administrative Code.

²⁸ *Id.* at para. 14.

1. The PUCO's indefinite delay of investigating the FirstEnergy Utilities' potential violation of Ohio law is unreasonable and harms consumers because it is against law and state policy.

It is state policy to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.²⁹ It appears that the undisclosed “side agreement” was linked to IEU-Ohio’s withdraw of its opposition to the settlement in the FirstEnergy Utilities’ fourth electric security plan case.³⁰ Under the FirstEnergy Utilities fourth electric security plan, consumers have paid approximately \$1.8 billion in charges for just two riders approved in the plan: \$456 million for Rider DMR, and \$1.4 billion in Rider DCR since 2017.

IEU-Ohio is a sophisticated, knowledgeable, experienced party in PUCO proceedings made up of large industrial interests throughout the state of Ohio. Its withdraw of its opposition to the settlement under which the FirstEnergy Utilities ultimately proceeded with their fourth electric security plan changed the entire dynamics of the proceeding that ultimately resulted in a partial settlement approved by the PUCO. The settlement may not have been supported by certain parties, or may not have been approved by the PUCO, had IEU-Ohio not withdrawn its opposition. The FirstEnergy Utilities’ fourth electric security plan may have looked very different had IEU-Ohio continued its opposition and not been bought-off with the undisclosed side agreement. At a minimum, these matters need to be investigated – by the PUCO and parties through discovery – immediately. Consumers are currently paying charges under an electric

²⁹ R.C. 4928.02(A).

³⁰ Entry at paras. 9-10.

security plan that may have been the result of an unreasonable settlement based on an unlawful side agreement.

In overruling a decision by the PUCO preventing the disclosure of a side agreement, the Ohio Supreme Court ruled that side agreements are relevant to whether a settlement was the product of serious bargaining.³¹ Without serious bargaining, a settlement is not reasonable (and therefore should not be approved).³² As the Supreme Court explained:

Any such concessions or inducements [in side agreements] apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted. The existence of concessions or inducements would seem particularly relevant in the context of open settlement discussions involving multiple parties, such as those that purportedly occurred here. If there were special considerations, in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process. Therefore, we hold that the commission erred in denying discovery of this information based on lack of relevancy.³³

That consumers are currently paying charges under an electric security plan based on a settlement that may not have been the product of serious bargaining (and, therefore, should never have been approved) necessitates *immediate action* by the PUCO. Justice requires it. Fairness requires it. Consumers deserve it.

³¹ *Ohio Consumers' Counsel v. PUC*, 111 Ohio St. 3d 300, 320-21 (2006).

³² *See id.* at 319.

³³ *Id.* at 321.

2. The PUCO's indefinite delay of investigating the FirstEnergy Utilities' potential violation of Ohio law is unreasonable and harms consumers because it is against law governing discovery.

The PUCO's indefinite delay prohibiting investigation (both its own and parties') into the FirstEnergy Utilities' potential violation of Ohio law is antithetical to the law governing discovery. Parties may begin discovery when a proceeding is commenced under Ohio Admin. Code 4901-1-16(A). According to the PUCO "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts."³⁴ These rules are intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C. 4903.082.

R.C. 4903.082 states that "[a]ll parties and intervenors shall be granted ample rights of discovery."³⁵ The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases. The Ohio Supreme Court recently affirmed OCC's broad statutory rights to discovery (as intervenors) when it reversed the PUCO's ruling that, among other things, denied motions to compel discovery regarding FirstEnergy Advisors.³⁶

Despite the law governing discovery, allowing for broad discovery that may begin immediately so that parties can prepare their cases, the PUCO has said "no." Notwithstanding its recognition that the FirstEnergy Utilities may yet again have violated

³⁴ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

³⁵ *See OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789.

³⁶ *In re Suvon, LLC.*, 2021-Ohio-3630.

Ohio law, it will not permit the discovery necessary to investigate the matter. The PUCO's indefinite delay prohibiting investigation into the FirstEnergy Utilities' potential violation of Ohio law is antithetical to the law governing discovery.

3. The PUCO's indefinite delay of investigating the FirstEnergy Utilities' potential violation of Ohio law is unreasonable and harms consumers because it lacks any record support.

The PUCO has repeatedly stated regarding tainted H.B. 6 that it is “determined to act in a deliberate manner, based upon facts rather than speculation.”³⁷ Its ruling being challenged here is pure speculation. Though the PUCO says that it is indefinitely delaying investigation into the FirstEnergy Utilities' potential violation of Ohio law so as not to “interfere” with other investigation, it neither cites authority nor explains itself. Consumers deserve better and are entitled to better. That is why, for example, R.C. 4903.09 requires that PUCO decisions must be based on findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.³⁸ This requirement was confirmed by the Ohio Supreme Court in *Tongren*,³⁹ and most recently in *FirstEnergy Advisors*.⁴⁰ The PUCO should have provided reasoning for the investigative delay. But it didn't.

The silence is deafening and confirms that there really is no good reason for the PUCO's indefinite delay. As the PUCO itself acknowledged in its Entry, it has *exclusive*

³⁷ *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).

³⁸ R.C. 4903.09.

³⁹ *See Tongren v. PUC*, 85 Ohio St.3d 87, 1999-Ohio-206, 706 N.E.2d 1255 (“Tongren”).

⁴⁰ *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630 (“FirstEnergy Advisors”).

jurisdiction over the matters involved here.⁴¹ So neither the United States Attorney's criminal investigation nor the Ohio Attorney General's civil case are implicated or would otherwise be interfered with were the PUCO (and parties) to immediately begin investigating the FirstEnergy Utilities' potential violation of Ohio law. Because the PUCO has exclusive jurisdiction here, there is no overlap between the issues here and those involved in the other investigations. The investigations *could not* interfere with one another.

III. CONCLUSION

No hearing in this case (or in any other investigation case) can be scheduled consistent with justice and fairness until there has been a complete, thorough, robust investigation – by the PUCO itself and parties. In consumers' interest, and as a step toward restoring trust in Ohio's government, the PUCO should immediately begin investigating the FirstEnergy Utilities potential violation of Ohio law, and allow parties to do so too. The PUCO should grant rehearing on OCC's assignment of error and modify or abrogate its Order as described above. Granting rehearing is necessary to immediately protect all of FirstEnergy's consumers.

⁴¹ Entry at para. 14.

Respectfully submitted,

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/s/ William J. Michael

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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 14th day of January 2022.

/s/ William J. Michael
William J. Michael
Assistant Consumers' Counsel

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

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Subject: Re: Status of Open Items -Randazzo
Date: Thu, 21 May 2015 12:19:00 +0000
Importance: Normal

agree - would like to hear what he thinks about aep's filing and other general matters.

Michael J. Dowling
Senior Vice President, External Affairs
330-384-5761

On May 21, 2015, at 8:13 AM, Ridmann, William R. <wrridmann@firstenergycorp.com> wrote:

Although I didn't think we needed the meeting, I don't think it would hurt to just get a better understanding of the process going forward so there are no surprises.

William R. Ridmann
Vice President, Rates & Regulatory Affairs
FirstEnergy Service Corp.
330-761-4154

From: Yeboah, Ebony L
Sent: Wednesday, May 20, 2015 9:38 PM
To: Vespoli, Leila L.; Ridmann, William R.; Dowling, Michael J.
Subject: Status of Open Items -Randazzo

We are scheduled to have one of our regularly scheduled meetings with Sam tomorrow at 2pm. I believe we have completed (except payment) each of our open items (see below) with Sam and the meeting tomorrow can be cancelled. I suggested to Sam yesterday that we should cancel the meeting and he preferred to make it a game day decision. I asked whether he believed anything was open in which to discuss and he said he was not aware of anything in which to discuss. Should I follow up tomorrow morning to cancel the meeting?

Previously Open Items

1. ESP – We completed the language to be inserted in our next Stipulation to add additional ELR language and new transmission language. Sam has agreed to submit a letter indicating that he would not offer any witness and his testimony should be deemed withdrawn. He did not really want to withdraw his testimony and argued that not providing a witness to sponsor it should be sufficient. I agreed that in the real world it should be sufficient but that we really wanted him to officially withdraw it so no one tried anything "funny" later. He agreed to do it but noted his letter would somehow signal that the withdraw was based on a supplemental stipulation to come. I have to think about how to handle a discovery request for the language. I am thinking we will have to surrender it in advance of filing the actual supplemental stipulation. We should probably discuss.
2. Lincoln Electric – We have agreed to the language for the settlement agreement. We now just need to execute the agreement and make payment. I will ensure that this is completed.

0152

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Case No(s). 20-1629-EL-RDR

Summary: Application Application for Rehearing Regarding PUCO Entry Indefinitely
Delaying Investigation of FirstEnergy by Office of the Ohio Consumers' Counsel
electronically filed by Ms. Patricia J. Mallarnee on behalf of Michael, William