





OCC sought to exercise its ample rights of discovery that it is guaranteed under Ohio law (R.C. 4903.082)—*pre-hearing* discovery rights that are to be used “to facilitate thorough and adequate preparation for participation in commission proceedings.”<sup>5</sup> Such discovery is all the more important given that two million Ohioans paid nearly half a billion dollars to the FirstEnergy Utilities for the distribution modernization charges.

The PUCO rejected OCC’s argument that R.C. 4903.082 allows OCC to conduct a pre-hearing deposition of a state-hired auditor. The PUCO’s March 9, 2022 Entry is unreasonable and unlawful and contrary to the public interest. 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 unlawful and unreasonable in the following respects:

- A. **ASSIGNMENT OF ERROR NO. 1:** The PUCO erred by acting unreasonably and unlawfully when it found that its discovery rules, precluding a party from subpoenaing “a member of the commission staff,” do not conflict with all parties’ ample rights of discovery under R.C. 4903.082.
  - 1. The PUCO’s discovery rules directly contradict R.C. 4903.082
    - a. R.C. 4903.06 does not invalidate the broad discovery guarantee under R.C. 4903.082
    - b. The PUCO has no authority to enact rules in conflict with statutes
    - c. OCC’s discovery was reasonable, not “unfettered.”
  - 2. The state-hired auditor, Oxford, was not a “member of the commission staff”

---

Rehearing at ¶ 282 (Oct. 12, 2016); Eighth Entry on Rehearing at ¶ 113 (Aug. 16, 2017), Ninth Entry on Rehearing at ¶¶ 17-20 (Oct. 11, 2017).

<sup>5</sup> O.A.C. 4901-1-16.

- a. OCC's deposition of the auditor would not interfere with the auditor's investigation which was ended two years ago, nor would it violate R.C. 4901.16
  - b. It was inappropriate for the PUCO to resort to regulatory history to support its findings, when the rules were unambiguous
- B. **ASSIGNMENT OF ERROR NO. 2:** The PUCO erred by acting unreasonably and unlawfully, violating R.C. 4903.09, when it ruled that OCC failed to demonstrate prejudice from its ruling and when it found no prejudice to OCC.
- C. **ASSIGNMENT OF ERROR NO. 3:** The PUCO erred by acting unreasonably when it ruled that OCC had not shown good cause, and when it found no good cause itself, to waive O.A.C. 4901-1-25, and allow for a prehearing deposition of the state auditor when there is an issue about whether undue or improper influence has been exerted over the auditor.
1. OCC provided good cause for seeking a waiver of the PUCO rules
  2. Deposition of the state-hired auditor on its findings and its non-existent final report are squarely within the scope of this proceeding where the PUCO is investigating FirstEnergy's use of nearly half a billion dollars collected from the FirstEnergy Utilities' consumers under the so-called distribution modernization rider.
  3. OCC's deposition of the state-hired auditor will not interfere with the federal criminal investigation or the Ohio Attorney General's civil suit.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis (0020847)  
Counsel of Record  
William Michael (0070921)  
John Finnigan (0018689)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700  
Columbus, Ohio 43215  
Telephone [Willis]: (614) 466-9567  
Telephone [Michael]: (614) 466-1291  
Telephone [Finnigan]: (614) 466-9585  
[maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov)  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
(willing to accept service by e-mail)

## TABLE OF CONTENTS

	<b>PAGE</b>
I. INTRODUCTION .....	1
II. MATTERS FOR CONSIDERATION.....	3
A. ASSIGNMENT OF ERROR NO. 1: The PUCO erred by acting unreasonably and unlawfully when it ruled that its discovery rules, precluding a party from subpoenaing “a member of the commission staff,” do not conflict with all parties’ ample “rights of discovery under R.C. 4903.082. ....	3
1. The PUCO’s discovery rules directly contradict R.C. 4903.082.....	4
a. R.C. 4903.06 does not invalidate the broad discovery guarantee under R.C. 4903.082. ....	6
b. The PUCO has no authority to enact rules in conflict with statutes. ....	7
c. OCC’s discovery was reasonable, not “unfettered.”.....	8
2. The state-hired auditor, Oxford, was not a “member of the commission staff.” .....	9
a. OCC’s deposition of the auditor would not interfere with the auditor’s investigation which was ended two years ago, nor would it violate R.C 4901.16. ....	10
b. It was inappropriate for the PUCO to resort to regulatory history to support its findings when the rules were unambiguous.....	11
B. ASSIGNMENT OF ERROR NO. 2: The PUCO erred by acting unreasonably and unlawfully, violating R.C. 4903.09, when it ruled that OCC failed to demonstrate prejudice from its ruling and found no prejudice to OCC. ....	12
C. ASSIGNMENT OF ERROR NO. 3: The PUCO erred by acting unreasonably when it found that OCC had not shown good cause, and when it found no good cause to waive O.A.C. 4901-1-25, to allow a prehearing deposition of the state auditor when there is an issue about whether undue or improper influence has been exerted over the auditor. ....	17

1.	OCC provided good cause for seeking a waiver of the PUCO rules. ....	17
2.	Deposition of the state-hired auditor on its findings and its never-completed final report are squarely within the scope of this proceeding where the PUCO is investigating FirstEnergy’s use of nearly half a billion dollars collected from FirstEnergy consumers under the so-called distribution modernization rider. ....	22
3.	OCC’s deposition of the state-hired auditor will not interfere with the federal criminal investigation or the civil action by the Ohio Attorney General. ....	24
III.	CONCLUSION.....	26

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

---

**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

**I. INTRODUCTION**

OCC seeks to depose one of the state’s hired auditors in this case, Oxford Advisors, whose work for the PUCO curiously ended two years ago when the Commissioners, including former Chair Randazzo, unanimously ruled<sup>6</sup> to dismiss and close the case before Oxford completed and filed its final report. OCC intends to examine, among other things, the Auditor’s conclusions and recommendations on whether FirstEnergy used the distribution modernization charges collected from its two million utility consumers for unauthorized purposes, including tainted H.B. 6 spending.

The prehearing deposition would also delve into whether undue or improper influence has been exerted in this case over the Auditor. Of particular concern is how the auditor’s investigation was impacted by, among other things, former PUCO Chairman Randazzo’s alleged “burning” of the final audit report.<sup>7</sup> On top of it all, this is the case where the Auditor’s mid-term filed report is inexplicably bereft of the strong consumer

---

<sup>6</sup> *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-UNC, Entry (Feb. 26, 2020).

<sup>7</sup> See attached text.



protection recommendations that were contained in its immediately preceding quarterly report to the PUCO Staff (its Third Interim Quarterly Report).<sup>8</sup> And relatedly, OCC has obtained the following email from the auditor, Paul Corey of Oxford Advisors, a day after its Third Interim Quarterly Report, that discusses an hour-long meeting with Commissioner Conway and a PUCO Staff member regarding that interim report:

**From:** Paul Corey  
**To:** Zell, James  
**Cc:** McCarter, Doris  
**Subject:** FE Interim Report  
**Date:** Wednesday, October 17, 2018 2:13:34 AM  
**Attachments:** [Oxford FirstEnergy Third Interim Report October 16, 2018.pdf](#)

---

Jim,

We met with Howard, Doris and Tammy for about two hours and focused on FirstEnergy. Then we met with Commissioner Conway and Doris for about an hour and discussed both FirstEnergy and DP&L. I thought both meetings went very well and we also received some valuable input on their high level thoughts on the matters. Attached for your review is an electronic copy of the FirstEnergy Interim Report. We didn't end up going through the DP&L Interim Report at the meetings although we did cover some of the key items in the report with Commissioner Conway. After the meetings, Joe, Diana, Greg and I met to debrief. We discussed some of the feedback we received and the additional analysis that is needed regarding grid modernization as well as a few other items that were raised at the meetings. We are going to make a few changes to the DP&L report and we need to conduct the additional analysis on grid modernization, which is time sensitive. We will turnaround both as quickly as possible. We are targeting getting them done by the end of the week, or over the weekend at the latest so you have them by Monday morning. We can set up a time to discuss the DP&L report next week.

Thanks,  
Paul

But the PUCO is preventing OCC from deposing the state-hired Auditor before the evidentiary hearing. On February 18, 2022, Attorney Examiner Price denied OCC's motion to depose Oxford. OCC filed an interlocutory appeal, and request for certification of Attorney Examiner Price's ruling on February 23, 2022. By Entry dated March 8, 2022, Attorney Examiner Werman St. John, certified the appeal to the Commissioners.

---

<sup>8</sup> See attached.

On March 9, 2022, the PUCO affirmed Attorney Examiner Price’s February 18, 2022 Entry “in its entirety.”<sup>9</sup>

As noted by U.S. District Judge John Adams, presiding over a shareholder suit against FirstEnergy,<sup>10</sup> the H.B. 6 bribery scandal has “undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials. The public has a right to know how it is that the political process was so easily corrupted.”<sup>11</sup> Attorney General Yost advised that “[g]overnment of, by and for the people also must be *open* to the people.”<sup>12</sup> The PUCO’s prevention of OCC’s fact-finding is inconsistent with Ohio law, unreasonable, and not in the public interest. The PUCO’s Entry defeats the public’s right to know by shrouding the auditor’s actions (or inactions) in secrecy.

## II. MATTERS FOR CONSIDERATION

### A. **ASSIGNMENT OF ERROR NO. 1: The PUCO erred by acting unreasonably and unlawfully when it ruled that its discovery rules, precluding a party from subpoenaing “a member of the commission staff,” do not conflict with all parties’ ample rights of discovery under R.C. 4903.082.**

In its Entry, the PUCO found that “Ohio Adm. Code 4901-1-25 and 4901-1-16 are not in conflict with R.C. 4903.082, which provides for ‘ample discovery’ in proceedings, but not unfettered discovery opportunities.”<sup>13</sup> The PUCO relied upon the

---

<sup>9</sup> *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-UNC, Entry at ¶ 40 (Mar. 9, 2022).

<sup>10</sup> *Miller v. Anderson*, Case No. 5:20CV1743 (N.D. Ohio).

<sup>11</sup> *Id.*, Order at 8 (Mar. 22, 2022).

<sup>12</sup> *Protecting the unprotected*, Ohio Sunshine laws at i (2022).

<sup>13</sup> *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-UNC, Entry at ¶ 30 (Mar. 9, 2022).

specific language in R.C. 4903.06, which states that the Commission “may cause” depositions to be taken in PUCO investigations. The PUCO found that R.C. 4903.06 does not “command the Commission to require depositions of any particular witnesses or dictate the manner in which they are to be taken”<sup>14</sup> Additionally, the PUCO found that R.C. 4903.082 “demonstrates that the legislature has granted broad discretion to this Commission” to implement its own rules, “bolstered by the general policy in Ohio that an administrative agency has broad discretion to fashion its own discovery rules.”<sup>15</sup>

The PUCO’s reasoning is flawed. Therefore, its conclusion – that its rules do not conflict with Ohio law (R.C. 4903.082) – is wrong. The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to allow the state-hired auditor to be deposed prior to the evidentiary hearing in this case.

**1. The PUCO’s discovery rules directly contradict R.C. 4903.082.**

R.C. 4903.082 is mandatory. “All parties and intervenors *shall* be granted ample rights of discovery.” It *only* authorizes the PUCO to promulgate rules “to *aid* full and reasonable discovery by all parties.” (Italics added). The rules<sup>16</sup> that the PUCO is enforcing (precluding discovery of PUCO Staff, including a deposition) do not *aid* full and reasonable discovery. The rules restrict discovery. The PUCO rules conflict with R.C. 4903.082.

The PUCO rules preclude parties to a PUCO proceeding from obtaining prehearing discovery (including depositions) from the PUCO Staff, which is a party to

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> O.A.C. 4901-1-25 and 4901-1-16.

PUCO proceedings in all respects, despite the PUCO rules that declare otherwise.<sup>17</sup> The PUCO Staff may (and does) conduct discovery, by issuing data requests on its own or through its retained experts. The PUCO Staff may attend depositions and question witnesses at such depositions. The PUCO Staff, like other parties, files testimony in support of its positions. The PUCO Staff attends hearings and may cross examine witnesses like other parties. The PUCO Staff files pleadings in cases, including briefs, like other parties. The PUCO Staff negotiates with other parties to resolve contested matters. The PUCO Staff can be a party to a settlement. And yet despite the PUCO Staff exercising all the rights of other parties to PUCO proceedings, it alone is unfairly exempt from discovery under the PUCO's rules.

Contrary to the PUCO's assertions otherwise, there is a clear inconsistency between R.C. 4903.082 and the PUCO rules which preclude discovery of the PUCO Staff. An administrative rule is inconsistent with a statute where the rule contravenes or is in derogation of some express provision of the statute.<sup>18</sup> An administrative rule may not subtract from a legislative enactment.<sup>19</sup> Here, the PUCO rules subtract from the legislative enactment of R. C. 4903.082, by not allowing ample rights of discovery as it pertains to the PUCO Staff.

A rule that conflicts with a statute is invalid.<sup>20</sup> Administrative rules and regulations are not created by the legislature but are promulgated by administrative agencies by a statutory delegation of authority. Because administrative agencies possess

---

<sup>17</sup> See O.A.C. 4901-1-16(I).

<sup>18</sup> *State e rel Curtis v DeCorps*, (1938), 134 Ohio St. 295.

<sup>19</sup> *Hoffman v. Ste Med. Board*, 113 Ohio St.3d 376, 2002-Ohio-2201, ¶ 17.

<sup>20</sup> *Id.*, citing *Cent. Ohio Joint Vocational School Dist. Bds. Of Edn. v. Ohio Bur. Of Emp. Servs.* (1986), 21 Ohio St.3d 5, 10, 487 N.E.2d 288.

only such rulemaking power as are delegated to them by statute, an administrative rule which conflicts with a valid existing statute is invalid.<sup>21</sup>

The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to allow the state-hired auditor to be deposed prior to the evidentiary hearing in this case.

**a. R.C. 4903.06 does not invalidate the broad discovery guarantee under R.C. 4903.082.**

The PUCO appears to argue that the general, mandatory discovery policy provisions of R.C. 4903.082 conflicts with a more specific statute, R.C. 4903.06, which applies to depositions. The PUCO emphasizes that the deposition statute is permissive allowing the PUCO, but not requiring it, to conduct depositions.<sup>22</sup> But the PUCO’s analysis, loosely based on statutory construction, is not appropriate where the statutes at issue are unambiguous. Statutes that are not ambiguous are to be applied, not construed.<sup>23</sup> Here both statutes are unambiguous. R.C. 4903.082 sets a general policy for discovery guaranteeing parties ample discovery rights and requiring the PUCO to regularly review its rules “to aid full and reasonable discovery.” R.C. 4903.06 allows the PUCO or any party to “cause the depositions of witnesses residing within or without the state to be taken.”

And even if the statutes were considered ambiguous (they are not), under Ohio rules of statutory construction, when a general provision conflicts with a special

---

<sup>21</sup> *Id.*

<sup>22</sup> *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-UNC, Entry at ¶ 30 (Mar. 9, 2022).

<sup>23</sup> *See, e.g., Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8; *In the Matter of the Complaint of Union Rural Electric Cooperative Inc. v. Dayton Power and Light Co.*, Case No. 88-947-EL-CSS, Rehearing Entry at ¶ 6 (Aug. 23, 1989).

provision, the provisions shall be construed to give effect to both.<sup>24</sup> Giving effect to both would mean that depositions not only *may* be conducted but *should be* allowed in the exercise of parties’ ample discovery rights.

Further, contrary to the PUCO’s assertion, R.C. 4903.06 *does* not provide the PUCO with the unlimited discretion when it comes to taking depositions. Instead, it dictates the manner in which depositions are to be taken. It provides that depositions are “to be taken *in the manner prescribed* for depositions in civil actions in the court of common pleas.” (Italics added). R.C. 4903.06 dovetails into the provision in R.C. 4903.082, which also directs that the PUCO “should” use Ohio’s Rules of Civil Procedure “wherever practicable.”

**b. The PUCO has no authority to enact rules in conflict with statutes.**

The PUCO also states that it has broad discretion to implement its own rules to ensure that parties are provide *full and reasonable* discovery.<sup>25</sup> And while the PUCO has broad discretion to promulgate valid and enforceable rules, it cannot enact rules that are unreasonable or in conflict with statutory enactments covering the same subject matter.<sup>26</sup> Here the rules are unreasonable because they unfairly preclude discovery of PUCO Staff. And the rules conflict with R.C. 4903.082 by inhibiting parties’ rights to ample discovery.

---

<sup>24</sup> R.C. 1.51.

<sup>25</sup> *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-UNC, Entry at ¶ 30 (Mar. 9, 2022).

<sup>26</sup> *State ex rel. Curry v. Indus. Comm.* (1979), 58 Ohio St.2d 268, 269, 389 N.E.2d 1126.

**c. OCC's discovery was reasonable, not "unfettered."**

Contrary to the PUCO assertions otherwise, OCC is not seeking unfettered discovery opportunities. OCC was merely seeking to depose the Auditor, Oxford Advisors, prior to hearing and obtain documents from the auditor. Under Ohio Civil Rules which are "to be used whenever practicable," the scope of discovery is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving issues and whether the burden or expense of discovery outweighs its likely benefit." Ohio Civ. Rule 26(B)(1). Such factors weigh heavily in OCC's favor for deposing the state-appointed auditor and obtaining records from the audit.

The PUCO's denial of OCC's subpoenas (for documents and a deposition) is also contrary to O.A.C. 4901-1-16(A). That discovery rule establishes the purpose of the PUCO discovery rules: "to encourage the prompt and expeditious use of *prehearing discovery* in order to facilitate thorough and adequate preparation for participation in commission proceedings."<sup>27</sup>

This is not just *any* case (and we are not asking to conduct discovery in just any case). It's an extraordinary case. As the PUCO is well aware, it relates to a multimillion-dollar bribery scheme – what federal prosecutors have called "the largest bribery scheme

---

<sup>27</sup> O.A.C. 4901-1-16(A).

ever” in Ohio.<sup>28</sup> The PUCO’s decision prohibiting OCC’s fact-finding in the public interest is inconsistent with not only R.C. 4903.082, but also the Ohio Civil Rules.

**2. The state-hired auditor, Oxford, was not a “member of the commission staff.”**

The PUCO also relies on its own rules saying that it “has long established that discovery should not be permitted with respect to Staff, including auditors such as Oxford.”<sup>29</sup> But the PUCO ignores the plain language of its own rules<sup>30</sup> which preclude discovery only on a “member of the commission staff.”

Oxford is not “a member of the commission staff.” Oxford was a state-hired independent contractor whose work ended when the PUCO commissioners closed and dismissed the case before the final audit report was completed or filed. We agree that Oxford was a third-party that assisted the Staff. But that does not make it a “member of the commission staff.” Moreover, the fact that the PUCO Entry stated that Oxford is to execute duties via the PUCO’s authority does not make the auditor a “member of the commission staff.”

The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to allow the state-hired auditor to be deposed prior to the evidentiary hearing in this case.

---

<sup>28</sup> N. Reimann, *Ohio Speaker of the House Arrested in State’s ‘Largest Bribery Scheme Ever,’* Forbes.com (Jul. 21, 2020).

<sup>29</sup> *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-UNC, Entry at ¶ 31 (Mar. 9, 2022).

<sup>30</sup> O.A.C. 4901-1-25(D).



**a. OCC’s deposition of the auditor would not interfere with the auditor’s investigation which was ended two years ago, nor would it violate R.C 4901.16.**

The PUCO relies greatly upon the investigatory authority that the Staff possesses and the nondisclosure provisions during the audit.<sup>31</sup> It warns that by adopting OCC’s arguments, auditors would be subject to discovery requests from public utilities during the course of their review and investigation.<sup>32</sup> According to the PUCO, auditors are an extension of the staff. Treating them otherwise, “would not be in the public interest and invokes policy reasons for disallowing such conduct including the ability of the Staff to efficiently and effectively conduct its review.”<sup>33</sup>

But that argument holds no water. The statute (R.C. 4901.16) which precludes an “employee” or “agent” of the PUCO from divulging information obtained during an investigation or audit has been construed by the PUCO to provide limited protection. The PUCO has held that once the investigation is complete, information may be divulged that otherwise could not have been disclosed during the investigation.<sup>34</sup> Here OCC did not seek discovery from the Auditor (the PUCO’s “agent”) before the audit was complete. In

---

<sup>31</sup> *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-UNC, Entry at ¶¶ 31-32 (Mar. 9, 2022).

<sup>32</sup> *Id.*, footnote 2.

<sup>33</sup> *Id.* at ¶ 32.

<sup>34</sup> *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-418-EL-AIR, Entry at ¶ 5 (Aug. 23, 1991) (finding that R.C. 4901.16 “only prevents premature disclosure of information by the staff of the Commission.”); *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Powe Company*, Case No. 11-5906-EL-FAC, Entry (Feb. 3, 2016) (Ordering the release of a draft audit report after the audit was complete and the final audit report filed, after finding that R.C. 4901.16 does not preclude the release of draft audit report and communications indefinitely).

fact, Oxford’s auditing was prematurely ended when the PUCO closed and dismissed the case before Oxford’s final report, all more than two years ago.

Conducting a deposition of an auditor after the investigation is complete will not affect the ability of the Staff to efficiently and effectively conduct its review. Notably, the PUCO Staff, in its numerous responsive pleadings, never once argued that OCC’s deposition of its auditor interfered with its investigation. It could not have. The auditor’s activities ceased more than two years ago! Fears that the PUCO Staff’s investigation process would be interrupted by allowing discovery after the investigation is complete are baseless.

**b. It was inappropriate for the PUCO to resort to regulatory history to support its findings when the rules were unambiguous.**

The PUCO also tries to ignore the rule’s plain language by discussing “regulatory history.”<sup>35</sup> It claims that there have been many cases where the Staff has adopted the audit report and presented those findings as a “Staff exhibit” as part of its case-in-chief. And the PUCO claims it is not aware of any instance where OCC has objected or claimed that Staff is not the appropriate party to move the report into evidence.<sup>36</sup> It also claims that OCC’s prior recommendation to permit discovery on auditors was expressly denied in 2006.<sup>37</sup>

---

<sup>35</sup> *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-UNC, Entry at ¶ 31 (Mar. 9, 2022).

<sup>36</sup> *Id.*, at ¶ 32.

<sup>37</sup> *Id.* at ¶ 31.

But regulatory history is not relevant when it comes to applying an unambiguous rule. Rules, like statutes, must be applied consistent with their plain language.<sup>38</sup> Only if a rule is capable of bearing more than one meaning is it appropriate to consider regulatory history. The Ohio Supreme Court has said:

ambiguity in a statute exists only if *its language* is susceptible of more than one reasonable interpretation. Thus, inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning.<sup>39</sup>

O.A.C. 4901-1-25(D) is unambiguous – it applies to “members of the commission staff” – not a contractor, or agent.<sup>40</sup> The PUCO’s reliance on regulatory history is in error and contrary to Ohio Supreme Court precedent.<sup>41</sup>

**B. ASSIGNMENT OF ERROR NO. 2: The PUCO erred by acting unreasonably and unlawfully, violating R.C. 4903.09, when it ruled that OCC failed to demonstrate prejudice from its ruling and found no prejudice to OCC.**

The PUCO ruled that “OCC has failed to establish how it has been prejudiced in its interlocutory appeal.”<sup>42</sup> In support, the PUCO said that Staff had been directed to

---

<sup>38</sup> R.C. 1.41 (“Sections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, subject to the conditions stated in section 1.51 of the Revised Code, *and to rules adopted under them.*”) (Italics added); 1.42. Ohio Admin. Code 4901-1-25(D) was adopted under R.C. 4901.13.

<sup>39</sup> *Dunbar v. State*, 136 Ohio St.3d 181, 186 (2013) (emphasis added).

<sup>40</sup> The PUCO states that “OCC conveniently omits to reconcile the fact that the Entry selecting Oxford provided that ‘Oxford will execute its duties pursuant to the Commission’s statutory authority to investigate and acquire records, contracts, reports, and other documentation under R.C. 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16.’” *Id.* (citation omitted). What statutes Oxford was executing its duties pursuant to is beside the point. The point is whether Oxford was a “member of commission staff.” Clearly, it was not.

<sup>41</sup> Additionally, the “regulatory history” upon which the PUCO relies was a rulemaking proceeding. *Id.*

<sup>42</sup> *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-UNC, Entry at ¶ 28 (Mar. 9, 2022).

produce a witness from Oxford at the evidentiary hearing to testify regarding Oxford's mid-term report.<sup>43</sup> It said that "prejudice is even more difficult to ascertain, given that it is unusual for any party in a Commission proceeding to claim that depositions are necessary before comments are filed."<sup>44</sup> And the PUCO said that OCC's interlocutory appeal "to some extent . . . could also be considered moot[]" because an Oxford witness has been directed to appear at hearing to testify about the mid-term report.<sup>45</sup>

As we explained in our interlocutory appeal, OCC specifically, and Ohioans generally, will suffer undue prejudice if we are prevented from our fact finding through a pre-hearing deposition of the state-hired auditor, Oxford. Attorney Examiner Price acknowledged that Oxford's "mid-term report may contain reliable, probative evidence regarding the Companies' use of DMR funds."<sup>46</sup> As Oxford's *mid-term* report may contain reliable, probative evidence, then certainly Oxford's *failure to complete or file a final* report, is also just as relevant to the FirstEnergy utilities use of DMR funds. Denying OCC discovery that may lead to the discovery of admissible evidence prejudices OCC. It violates the rules governing discovery.<sup>47</sup> OCC is entitled to the information.<sup>48</sup>

Examiner Price's ruling, which the PUCO has now affirmed, further delays and hinders OCC's case preparation efforts and the search for truth and justice. Case preparation efforts are needed for the filing of written comments/objections. Case

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *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-UNC, Entry at ¶ 12 (Feb. 18, 2022); *see also* Entry at ¶ 28 (Mar. 9, 2022).

<sup>47</sup> *See* R.C. 4903.082; O.A.C. 4901-1-25 and 4901-1-16; Civ. R. 26.

<sup>48</sup> *See generally* OCC's Interlocutory Appeal at 15.

preparation is needed for the evidentiary hearing that is to be scheduled in this case.

Attorney Examiner Price's denial of OCC's subpoenas, and the PUCO's affirmance of that denial, interferes with OCC's discovery rights, case preparation, and case presentation.

The PUCO believes that there is no prejudice to OCC because an Oxford witness has been directed to appear at the hearing to testify about the mid-term report.<sup>49</sup> But O.A.C. 4901-1-28(E) already allows that "any person making or contributing to the report may be subpoenaed to testify at the hearing...." Oxford earlier filed such a report – its mid-term report.

More fundamentally, it is a false equivalency to treat cross-examining the auditor at hearing and deposing the auditor (per O.A.C. 4901-1-16 et seq.) as the same thing. They are not the same thing under Ohio's system of justice (which applies to the PUCO).

At a deposition, per O.A.C. 4901-1-16(B) et seq., it "is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." In other words, a deposition may inquire into matters whose relevance has not yet been proven. Discovery need only be "reasonably calculated" to lead to relevant evidence. Additionally, deposition testimony is taken with all objections noted and subject to the objections.<sup>50</sup> A party at a deposition asks questions to which another party may object. The deponent then provides answers, regardless of the objection, with few exceptions.

---

<sup>49</sup> *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-UNC, Entry at ¶ 28 (Mar. 9, 2022).

<sup>50</sup> O.A.C. 4901-1-21(I) ("Evidence objected to shall be taken subject to the objections.")

This Ohio standard is what especially makes depositions a powerful tool for the investigating that is part of case preparation – and it’s this case preparation that OCC has been denied in the PUCO’s Entry.

The scope of cross examination at an evidentiary hearing is more limited, with cross examination allowed on “relevant” matters and matters affecting credibility.<sup>51</sup> In other words, parties must prove the relevance of the matter, and cannot simply rely on the fact that the evidence it seeks *may lead to relevant admissible evidence*. Relevant matters are defined as matters “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.”<sup>52</sup> Whether facts are of consequence to the case is then determined by the hearing examiner. At a hearing, questions are asked, with parties provided the opportunity to object. Unlike a deposition, answers/evidence are only permitted if the objections are overruled.

The more open standard for pre-hearing discovery makes sense as it allows parties to zero in on what may be considered relevant and helpful to building one’s case. The more limited scope of questioning at hearing reflects the notion that once parties have conducted and concluded discovery, they can provide more targeted evidence that is “relevant” to the issues of consequence in the proceeding.

There is no support for the PUCO assertion that “prejudice is even more difficult to ascertain, given that it is unusual for any party in a Commission proceeding to claim that depositions are necessary before comments are filed.”<sup>53</sup> It should be first pointed out

---

<sup>51</sup> Ohio Evid. Rule 611(B).

<sup>52</sup> Ohio Evid. Rule 401.

<sup>53</sup> *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-UNC, Entry at ¶ 28 (Mar. 9, 2022).

(as OCC has done on numerous occasions) that this is an unusual case or, as the PUCO has described it, a case of “unique circumstances.” Moreover, the PUCO ignores the fact that it has announced there will be an evidentiary hearing scheduled in this case<sup>54</sup> which would make the deposition before the evidentiary hearing “usual.”

The same is true about the PUCO’s statement that OCC’s interlocutory appeal “to some extent . . . could also be considered moot[.]” because an Oxford witness has been directed to appear at hearing to testify about the mid-term report.<sup>55</sup> The PUCO offers no rationale, facts, or anything else to support the equivalency it is trying to draw – that the ability to cross-examine Oxford *at hearing* about its *mid-term report* renders moot OCC’s pre-hearing efforts to *depose and obtain documents* about Oxford’s failure to complete and file a *final report*.<sup>56</sup> This is not a decision with reasons based on findings of fact. That violates R.C. 4903.09.

The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to allow the state-hired auditor to be deposed prior to the evidentiary hearing in this case.

---

<sup>54</sup> *Id.*, Entry (Feb. 18, 2022).

<sup>55</sup> *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-UNC, Entry at ¶ 28 (Mar. 9, 2022).

<sup>56</sup> As explained earlier, a deposition is very different from cross-examination at hearing. Obviously, the mid-term and final reports are different.

**C. ASSIGNMENT OF ERROR NO. 3: The PUCO erred by acting unreasonably when it found that OCC had not shown good cause, and when it found no good cause to waive O.A.C. 4901-1-25, to allow a prehearing deposition of the state auditor when there is an issue about whether undue or improper influence has been exerted over the auditor.**

The PUCO found that OCC had not shown good cause to waive its rule that precludes parties from deposing a member of the commission staff (O.A.C. 4901-1-25).<sup>57</sup> It “supported” its conclusion with two reasons. First, it said that this case does *not* involve an investigation into whether the FirstEnergy Utilities used distribution modernization funds for improper purposes such as political activity.<sup>58</sup> Second, it said that preventing OCC’s fact finding was necessary so as not to interfere with the ongoing federal criminal investigation.<sup>59</sup>

The PUCO’s conclusion and “supporting” reasons are unreasonable. The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to allow the state-hired auditor to be deposed prior to the evidentiary hearing in this case.

**1. OCC provided good cause for seeking a waiver of the PUCO rules.**

Contrary to the PUCO assertions otherwise, OCC showed good cause to waive its rule and allow OCC’s prehearing fact finding to go forward. OCC explained that the depositions would examine the Auditor’s conclusions as to whether the FirstEnergy Utilities used the nearly half billion dollars of distribution modernization funds collected from consumers for unauthorized purposes, including political spending.

---

<sup>57</sup> *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-UNC, Entry at ¶ 33 (Mar. 9, 2022).

<sup>58</sup> *Id.* at ¶ 34.

<sup>59</sup> *Id.* at ¶ 35.



Additionally, OCC explained that the deposition would delve into how the auditor’s “independent” investigation was impacted by circumstances surrounding what is described, in a text message by FirstEnergy’s fired CEO Chuck Jones, as the “burning” of the final DMR report by former PUCO Chairman Randazzo.<sup>60</sup> While the facts lead to the doorstep of the PUCO, such questioning falls within the scope of the proceeding. The questioning goes to the credibility and bias of the auditor and whether his findings were unduly influenced by third parties including FirstEnergy executives, PUCO Commissioners or PUCO Staff.

OCC also confirmed that precluding the deposition of the auditor would thwart its “thorough and adequate preparation” of our case for the public.<sup>61</sup> We pointed out that preventing our fact finding is contrary to the PUCO’s stated objective to “to act in a deliberate manner, based upon facts rather than speculation.”<sup>62</sup>

In detail, we explained that the good cause for the waiver was tied to the very unique circumstances we find ourselves under. The supposed independent auditor does not produce his final audit report pertaining to FirstEnergy—a report that he is contractually required to produce,<sup>63</sup> all in the midst of what has been described as “likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio \*\*\*bribery, pure and simple.”<sup>64</sup>

---

<sup>60</sup> OCC’s Interlocutory Appeal at 1; 8.

<sup>61</sup> *Id.* at 2.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> *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, Entry, at RFP, page 4 (Dec. 13, 2017) (requiring auditor to produce a final assessment report that shall include an executive summary of recommendations).

<sup>64</sup> *Miller v. Anderson*, Case No. 5:20CV1743, Order at 2 (Mar. 22, 2022).

That infamous bribery scheme is detailed in the July 22, 2021 Deferred Prosecution Agreement between the United States Attorney's Office and FirstEnergy Corp., the defendant. In the Deferred Prosecution Agreement, FirstEnergy Corp. admitted that it "is responsible under United States law for the acts charged in the Information and as set forth in the Statement of Facts, attached \*\*\*and that the facts alleged in the Information and described in the Statement of Facts are true and accurate."<sup>65</sup> The charges consist of "conspiracy to commit honest services wire fraud."<sup>66</sup>

FirstEnergy Corp. specifically agreed that "if this case proceeded to trial, the United States would prove the facts set forth below beyond a reasonable doubt."<sup>67</sup> Within the thirty pages of facts are admissions that "FirstEnergy Corp., through the acts of its officers, employees, and agents, conspired with public officials and other individuals and entities to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy Corp's benefit."

*One of the public officials was the former PUCO Chair Randazzo, referred to in the Statement of Facts as "Public Official B."*<sup>68</sup> FirstEnergy Corp. "paid \$4.3 million dollars to Public Official B through his consulting company in return for Public Official B performing official action in his capacity as PUCO Chairman to further FirstEnergy

---

<sup>65</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 1 (Jul. 22, 2021).

<sup>66</sup> *Id.* at 2.

<sup>67</sup> *Id.* at 17.

<sup>68</sup> *Id.* at 16, describing "Public Official B" as "the Chairman of the Public Utilities Commission of Ohio ("PUCO") from April 2019 until November 21, 2020, when he resigned."

Corp.’s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”<sup>69</sup>

Also, under the Statement of Facts was an excerpt of a March 4, 2020 text message exchange “about possible future favorable action by Public Official B.”<sup>70</sup> The partial text message subsequently became known in full, and included a reference to the former Chair allegedly “burning the DMR final report”:

DC **Dennis Chack**

Any luck on talking with Sam on energy license we just received request for additional comments

CJ **Charles Jones**

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.<sup>71</sup>

Here is the context for that March 4, 2020, text. The PUCO Staff moved for a short extension of time for filing the Oxford final report – from February 25, 2020 to March 31, 2020.<sup>72</sup> A day after Oxford’s final audit was otherwise due, former PUCO Chair Sam Randazzo and other Commissioners surprisingly ruled that there would not be a final audit report.<sup>73</sup>

---

<sup>69</sup> *Id.* at 17.

<sup>70</sup> *Id.* at 43.

<sup>71</sup> *In the Matter of the Application of Suvon, LLC d/b/a FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Motion to Withdraw, Exhibit A (Nov. 2, 2021) (emphasis added).

<sup>72</sup> *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-UNC, PUCO Staff Motion for Extension of Time (Feb. 18, 2020).

<sup>73</sup> *Id.*, Entry (Feb. 26, 2020).

In light of these events, OCC naturally has a myriad of questions. Had Oxford initiated efforts to produce a final report? If so, why or why not? What direction was given to Oxford about its final DMR report, and by whom? Had Oxford asked the PUCO Staff to request an extension of the filing date for a final audit report? What had Oxford found? Had it found that DMR funds were used for tainted H.B. 6 purposes? Who had it told of its findings? Was Oxford directed to “burn” its final report? If so, who directed the “burning?” In addition, the PUCO’s contract with Oxford allotted \$395,000 for Oxford to complete its services (an unusually large amount for this type of service) and it is unclear whether funds were paid to Oxford even though they did not complete all activities under its contract. (Consumers pay the cost of these types of audits).

These questions just scratch the surface. Such questions are relevant and reasonably calculated to lead to the discovery of admissible evidence.<sup>74</sup> They need to be asked to provide the public with answers. OCC is seeking to follow the facts where they lead --something the PUCO has promised to do. But if fact finding is shut down by denying access to the facts, we may never know the answers. A deposition of the PUCO auditor will allow OCC to follow the facts. There is good cause to allow OCC to move forward with its deposition of Oxford, prior to the evidentiary hearing in this case.

The PUCO Entry holding otherwise is contrary to the record evidence, violating R.C. 4903.09. The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to allow the state-hired auditor to be deposed prior to the evidentiary hearing in this case.

---

<sup>74</sup> See O.A.C. 4901-1-16.

**2. Deposition of the state-hired auditor on its findings and its never-completed final report are squarely within the scope of this proceeding where the PUCO is investigating FirstEnergy’s use of nearly half a billion dollars collected from FirstEnergy consumers under the so-called distribution modernization rider.**

OCC’s questioning of the state-hired auditor would fall exactly within the original scope of this proceeding: a review of the expenditure of Rider DMR revenues to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization.<sup>75</sup> And the questioning of Oxford also falls within the additional review of Rider DMR that the PUCO ordered in response to OCC’s September 8, 2020 investigatory motions.<sup>76</sup>

Recall that at year-end 2020, the PUCO ruled that “given the *unique circumstances* at this time, and in the interest of both transparency and state policy, we find good cause exists to grant OCC’s motion and initiate an additional review of the entire duration of Rider DMR.”<sup>77</sup> The PUCO further ordered “[f]or clarity, the audit to be conducted should also include an examination of the time period leading up to the passage of H.B.6 and the subsequent referendum, in order to ensure funds collected from ratepayers through Rider DMR were only used for the purposes established in ESP IV.”(citation omitted).<sup>78</sup> Notably, the PUCO at that time, conceded that this case “does

---

<sup>75</sup> *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, Entry ¶ 4; RFP at 1 (Dec. 13, 2017).

<sup>76</sup> *Id.*, Entry (Dec. 30, 2020).

<sup>77</sup> *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-UNC, Entry at ¶ 22 (Mar. 9, 2022) (emphasis added).

<sup>78</sup> *Id.* at ¶ 23.

complement the Commission’s actions and efforts in Case No. 20-1502-EL-UNC,” but indicated that it “will not be consolidating the two proceeding at this time.”<sup>79</sup>

Now more than a year later, the PUCO is trying to narrow the scope of this proceeding to preclude OCC from exploring whether the *source* of tainted H.B. 6 activities came from distribution modernization funds collected from consumers. The PUCO says that this proceeding involves the improper *use* of funds collected from consumers under the DMR.<sup>80</sup> It claims that the question of the *source* of funds for political and charitable spending by the FirstEnergy utilities is being addressed in Case No. 20-1502-EL-UNC.<sup>81</sup>

This distorted view ignores the cross-over or complementary nature of this case and Case No. 20-1502-EL-UNC. If the *source* of political and charitable spending on H.B. 6 was the distribution modernization funds collected from consumers, then the *use* of customer-supplied modernization funds was improper, as it did not directly or indirectly support grid modernization.

For the PUCO to “find it necessary again to provide an overview of the purpose of these proceedings for the benefit of OCC[,]”<sup>82</sup> and then move the goal posts to *redefine* what the audit here is about, is the height of unreasonableness. The PUCO’s attempt to redirect this proceeding, at this late stage, to preclude OCC from exploring whether DMR funds were used for political spending on tainted H.B. 6, also contradicts its earlier Entries. The PUCO’s Entry was unreasonable in this regard. The PUCO should grant

---

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at ¶ 34.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at ¶ 32.

rehearing and modify its Entry under R.C. 4903.10 to allow the state-hired auditor to be deposited prior to the evidentiary hearing in this case.

**3. OCC’s deposition of the state-hired auditor will not interfere with the federal criminal investigation or the civil action by the Ohio Attorney General.**

The PUCO also acts unreasonably when it relies on the federal criminal investigation as rationale to shut down OCC’s deposition of the state-hired auditor. In this regard, the PUCO reiterates its “interest in not interfering with the Federal criminal investigation.”<sup>83</sup> It also claims that “it is of utmost concern to us that our investigations do not interfere with that criminal investigation by the U.S. Attorney or the action brought by the Ohio Attorney General.”<sup>84</sup> The PUCO concludes that “the facts that these actions are still ongoing weighs in favor of maintaining our well-established discovery process, especially at this stage of the proceeding, rather than fundamentally changing it as OCC requests.”<sup>85</sup>

The PUCO is the State of Ohio’s duly constituted agency to regulate public utilities.<sup>86</sup> The PUCO’s jurisdiction over the distribution modernization issues in this case (as the PUCO itself has acknowledged) is “exclusive[.]”<sup>87</sup> The PUCO admits that its investigations “complement” but do not supplant the ongoing criminal investigations.<sup>88</sup>

---

<sup>83</sup> *Id.* at ¶ 35.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See, e.g.,* Revised Code, Title 49.

<sup>87</sup> *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-UNC, Entry at ¶ 35 (Mar. 9, 2022).

<sup>88</sup> *Id.*

The PUCO’s investigation here *could not* interfere with the federal criminal investigation. The PUCO’s assertions here (and elsewhere) to the contrary are nothing more than an effort to shut down inquiry into their agency’s involvement in H.B.6 matters.

The former PUCO Chair’s alleged role in the H.B.6 scandal should be the reason for the PUCO to “come clean” to dispel what Chair French described as “a black cloud over the PUCO based upon the House Bill 6 scandal.”<sup>89</sup> Allowing a deposition of the PUCO auditor to explore undue influence that may have been exerted by the former PUCO chair or other members of the PUCO, would also be consistent with Chair French’s “top goal as chair”– “to restore the public trust in the PUCO.”<sup>90</sup>

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policemen.” So wrote Luis Brandeis in 1913, a few years before he joined the United States Supreme Court. That speaks to investigating the FirstEnergy scandals. The PUCO should not seek to shelter itself from the light.

Providing the public with information learned through discovery will serve to enhance the public’s trust. As noted by U.S. District Judge John Adams, presiding over a shareholder suit against FirstEnergy, the H.B. 6 bribery has “undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials.”<sup>91</sup> Transparency is needed to restore the public trust.

---

<sup>89</sup> Pelzer, J., New PUCO Chair Jenifer French: more transparency needed to lift the ‘black cloud’ of HB6 scandal, Cleveland.com (May 18, 2021).

<sup>90</sup> *Id.*

<sup>91</sup> *Miller v. Anderson*, Case No 5:20CV1743, Order at 8 (Mar. 22, 2022).



In another forum not far away, U.S. District Judge John Adams is demanding that deposition of FirstEnergy be taken for fact-finding.<sup>92</sup> And he is demanding facts.<sup>93</sup> And he has gotten more facts (within hours, not months).<sup>94</sup> Relatedly, Ohio Attorney General Yost noted, in a recent civil court pleading seeking to reengage in discovery with FirstEnergy, “[t]he cows have left the barn. It is time to stop manning the only closed barn door.”<sup>95</sup> The PUCO should follow in the footsteps of those seeking the truth.

Additionally, under this ruling, the PUCO is requiring, that in addition to showing a need for subpoenaed discovery, parties in this case must show that the discovery they seek will not “interfere” with the federal investigation. The PUCO is not vested with the authority to add this additional requirement for obtaining discovery.<sup>96</sup>

The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to allow the state-hired auditor to be deposed prior to the evidentiary hearing in this case.

### III. CONCLUSION

“[T]he purpose of the PUCO \* \* \* is to protect the customers of public utilities.”<sup>97</sup> The PUCO can protect consumers by granting rehearing and allowing OCC to pursue its fact finding in the public interest.

---

<sup>92</sup> *Id.*, Order (Mar. 24, 2022).

<sup>93</sup> *Id.* Order (Mar. 22, 2022).

<sup>94</sup> *Id.* Affidavit (Mar. 23, 2022).

<sup>95</sup> *State of Ohio v. FirstEnergy Corp., et al.*, Case No. 20CV 006281, Combined Reply of the State to Memos in Opposition to Request for a Status Conference & Supplemental Memorandum in Support of Motion to Partially Lift the Stay of Proceedings at 1 (Feb. 22, 2022).

<sup>96</sup> See e.g., *Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 373 (2007) (“The PUCO, as a creature of statute, has no authority to act beyond its statutory powers.”).

<sup>97</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 372 (2009) (Pfeifer, J. dissenting).

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis (0020847)  
Counsel of Record  
William Michael (0070921)  
John Finnigan (0018689)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700  
Columbus, Ohio 43215  
Telephone [Willis]: (614) 466-9567  
Telephone [Michael]: (614) 466-1291  
Telephone [Finnigan]: (614) 466-9585  
[maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov)  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
(willing to accept service by e-mail)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 8<sup>th</sup> day of April 2022.

/s/ Maureen R. Willis  
Maureen R. Willis  
Assistant Consumers' Counsel

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

### **SERVICE LIST**

[thomas.lindgren@ohioAGO.gov](mailto:thomas.lindgren@ohioAGO.gov)  
[kyle.kern@ohioAGO.gov](mailto:kyle.kern@ohioAGO.gov)  
[werner.margard@ohioAGO.gov](mailto:werner.margard@ohioAGO.gov)  
[mkurtz@BKLLawfirm.com](mailto:mkurtz@BKLLawfirm.com)  
[kboehm@BKLLawfirm.com](mailto:kboehm@BKLLawfirm.com)  
[jkylercohn@BKLLawfirm.com](mailto:jkylercohn@BKLLawfirm.com)  
[rdove@keglerbrown.com](mailto:rdove@keglerbrown.com)  
[Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  
[dparram@bricker.com](mailto:dparram@bricker.com)  
[rmains@bricker.com](mailto:rmains@bricker.com)

[bknipe@firstenergycorp.com](mailto:bknipe@firstenergycorp.com)  
[mrgladman@jonesday.com](mailto:mrgladman@jonesday.com)  
[mdengler@jonesday.com](mailto:mdengler@jonesday.com)  
[radoringo@jonesday.com](mailto:radoringo@jonesday.com)  
[sgoyal@jonesday.com](mailto:sgoyal@jonesday.com)  
[jang@calfee.com](mailto:jang@calfee.com)  
[khehmeyer@calfee.com](mailto:khehmeyer@calfee.com)  
[mpritchard@mcneeslaw.com](mailto:mpritchard@mcneeslaw.com)  
[rlazer@elpc.org](mailto:rlazer@elpc.org)  
[trent@hubaydougherty.com](mailto:trent@hubaydougherty.com)  
[mwise@mcdonaldhopkins.com](mailto:mwise@mcdonaldhopkins.com)  
[jweber@elpc.org](mailto:jweber@elpc.org)

Attorney Examiners:  
[megan.addison@puco.ohio.gov](mailto:megan.addison@puco.ohio.gov)  
[jacqueline.st.john@puco.ohio.gov](mailto:jacqueline.st.john@puco.ohio.gov)

**Short Message Report**

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

**Outline of Conversations**



**NODISPLAY** 1 message on 3/3/2020 • Charles Jones • Dennis Chack

**Messages in chronological order** (times are shown in GMT -04:00)

---



**NODISPLAY**

---

DC

**Dennis Chack**

3/3/2020, 11:23 AM

Any luck on talking with Sam on energy license we just received request for additional comments

## 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

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]  
[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.

**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on**

**4/8/2022 5:28:06 PM**

**in**

**Case No(s). 17-2474-EL-RDR**

Summary: App for Rehearing Application for Rehearing by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Willis, Maureen R.