

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION FOR THE PUCO TO MAKE ITS COMMISSIONERS AND
ADMINISTRATIVE LAW JUDGES SUBJECT TO THE OHIO CODE OF
JUDICIAL CONDUCT FOR THEIR ADMINISTRATION OF JUSTICE
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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July 7, 2022

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The Office of the Ohio Consumers' Counsel ("OCC") moves for the PUCO to adopt the Ohio Code of Judicial Conduct for its administration of justice by Commissioners and Administrative Law Judges in this case (or in general including but not limited to this case).¹ This Motion is explained more fully in the attached Memorandum in Support.

"An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law." The Supreme Court of Ohio included these high-minded words in the preamble to the Ohio Code of Judicial Conduct. Preamble, Code of Judicial Conduct (Mar. 1, 2009, as amended Oct. 15, 2020).

¹ Ultimately, the PUCO should adopt the Code as a general matter applying to all business of Commissioners and Administrative Law Judges in all matters.

The PUCO should make the Ohio Code of Judicial Conduct one of its touchstones for administration of justice for Ohio consumers.

This case, which is an investigation of FirstEnergy, has a backdrop in scandal. FirstEnergy stands charged by the U.S. government with a federal corruption-related crime. *U.S. v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Information (July 22, 2021). In the U.S./FirstEnergy Deferred Prosecution Agreement, FirstEnergy agreed that it had “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.” The public officials included the former Speaker of the House Larry Householder and the former PUCO Chair Sam Randazzo. Deferred Prosecution Agreement at 14-17 (July 22, 2021). The payments described as “bribery and kickbacks” (*id.* at 2) “furthered FirstEnergy Corp.’s interests relating to passage of nuclear legislation [H.B.6] and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.” *Id.* at 17.

FirstEnergy Corp. acknowledged that the federal government could prove the corruption-related crime against FirstEnergy in court. It agreed that “if this case proceeded to trial the United States would prove the facts set forth below beyond a reasonable doubt.” *Id.*, Deferred Prosecution Agreement at 14 (July 22, 2021).

The H.B. 6 scandal has been described by the U.S. Attorney as “likely the largest bribery, money-laundering scheme ever perpetrated against the people of the state of Ohio ***bribery, pure and simple.” As U.S. District Judge John Adams wrote, “[t]he bribery scheme has undoubtedly shaken whatever trust that Ohioans may have had in the

political process ***.” *Miller v. Anderson*, Case No. 5:20CV1743, Order at 8 (Mar. 22, 2022).

Against this backdrop of scandal that involves FirstEnergy Corp. (whose utilities are the party under investigation in this case) and former PUCO Chair Randazzo, adopting the Code of Judicial Conduct is especially warranted at the PUCO. It was not long ago that we learned of potential *ex parte* violations involving former PUCO Chair Randazzo and one or more FirstEnergy Corp. officials, through a belated revelation by FirstEnergy Advisors. *See In the Matter of the Application of Suvon LLC for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Motion to Withdraw the Certification Application of Suvon, Memorandum at 6 (November 2, 2021); *see* attached text messages. Such *ex parte* violations alone are reason enough to seek this fundamental protection for justice at the PUCO.

Indeed, it is warranted for the PUCO to adopt the Code of Judicial Conduct even without the major scandals. Why wouldn’t the PUCO want to be bound to the Code of Judicial Conduct?

Notably another Ohio agency, the Ohio Environmental Protection Agency (“OEPA”), has already adopted the Ohio Code of Judicial Conduct. In O.A.C. 3745-47-20(D), the OEPA bound itself to “behave in the manner prescribed for judges generally in the ‘Ohio Code of Judicial Conduct’ (2010).”

For the Ohio public, there really needs to be a full-scale investigation of the PUCO regarding the relationship between FirstEnergy and the former PUCO chair – and

all related matters wherever that leads. But a start is for the PUCO to now adopt the Ohio Code of Judicial Conduct.

The Ohio Code of Judicial Conduct was established by the highest state court in Ohio, the Supreme Court of Ohio. The PUCO should embrace what the high Court established for justice in Ohio. The PUCO should grant this motion to adopt the Ohio Code of Judicial Conduct.²

Respectfully submitted,

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² In filing this Motion, we do not concede that the PUCO is currently exempt from the Ohio Code of Judicial Conduct.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

OCC files this motion, per O.A.C. 4901-1-12, for the PUCO to make its Commissioners and Administrative Law Judges subject to the Ohio Code of Judicial Conduct in this case (or in general). A similar motion is being filed in the other PUCO investigations of FirstEnergy, Cases 17-974, 20-1502, and 20-1629.

It was not long ago that we learned, from a belated FirstEnergy Advisors filing, of potential *ex parte* violations involving former PUCO Chair Randazzo and one or more FirstEnergy Corp. officials related to FirstEnergy Advisors’ pending certificate case. *See In the Matter of the Application of Suvon LLC for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Motion to Withdraw the Certification Application of Suvon, Memorandum at 6 (November 2, 2021); *see* the attachment of text messages. Such *ex parte* violations alone are reason enough to seek this fundamental protection for justice at the PUCO.

The Ohio Code of Judicial Conduct establishes standards for the ethical conduct of judges. It is intended “to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct and provide a basis for regulating their conduct through disciplinary agencies.” Code of Judicial Conduct, Preamble, ¶3.

Under the Ohio Code of Judicial Conduct, there are four cannons providing for overarching principles of judicial ethics that all judges must observe. The cannons are:

Cannon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety

Canon 2: A judge shall perform the duties of judicial office impartially, competently, and diligently.

Cannon 3: A judge shall conduct the judge's personal and extrajudicial activities so as to minimize the risk of conflict with the obligations of judicial office.

Cannon 4: A judge or judicial candidate shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. *Id.*

There are also specific rules under each of the four cannons and comments that accompany the rules. Under the scope of the Code, it is advised that “judges should strive to exceed the standards of conduct established by the rules, holding themselves to the highest ethical standards and seeking to achieve these aspirational goals, thereby enhancing the dignity of the judicial office.” *Id.*

II. RECOMMENDATIONS

A. The PUCO should make applicable to its commissioners and its administrative law judges the Ohio Code of Judicial Conduct.

The PUCO's Commissioners and Administrative Law Judges (Attorney Examiners) have a prime role in the administration of justice in PUCO proceedings. Examiners are appointed “for the purpose of making any investigation or holding any inquiry or hearing which the commission is required or permitted to make or hold” and performing duties as prescribed by the commission. R.C. 4901.18.

Note that “The commission shall, by general order or in its order of appointment, prescribe the authority and duties of such examiners,” per R.C. 4901.18. The PUCO should “prescribe” that the Attorney Examiners are subject to the Ohio Code of Judicial Conduct.

The PUCO has an “obligation, as a quasi-judicial body, to conduct hearings in a manner that comports with the elements of fundamental fairness and due process.” *In re Complaint of the City of Cincinnati v. Cincinnati Gas & Elec. Co.*, No. 91-377-EL-CSS, 1991 Ohio PUC Lexis *798 (June 27, 1991). *See, e.g., Withrow v. Larkin*, 4211 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) (holding that “a fair trial in a fair tribunal is a basic requirement of due process [that] applies to administrative agencies which adjudicate as well as to courts.”) Fulfilling that lofty “obligation” to the public would be furthered by adopting the Ohio Code of Judicial Conduct.

For example, something shocking about justice at the PUCO was written in FirstEnergy text messages that were first referenced in the United States/FirstEnergy Deferred Prosecution Agreement, later referenced in discovery that OCC obtained and still later attached to a belated filing by FirstEnergy Solutions. It was texted by former CEO Jones that former PUCO Chair Randazzo supposedly said that: “He [Chair Randazzo] 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 [FE distribution modernization rider] final report has a lot of talk going on in the halls of PUCO about does he work there or for us?”

We note that, if the PUCO already has adopted the Ohio Code of Judicial Conduct, it is not obvious where that adoption can be found by the public. Any such

adoption of the code should be transparent and publicly posted. If the PUCO has not adopted the Code, then it should be adopted for this case. Applying the Ohio Code of Judicial Conduct to PUCO Commissioners and Administrative Law Judges would provide appropriate guidance and standards to the PUCO for its administration of justice in this case and provide parties with the awareness that the PUCO is beholden to the Code.³

B. The Ohio Supreme Court has recognized that the Ohio Code of Judicial Conduct is relevant in determining disqualification of PUCO Attorney Examiners.

The Ohio Supreme Court has considered portions of the Judicial Code as relevant in determining whether a PUCO Attorney Examiner should be disqualified. *See Duff v. Pub. Utilities Comm.*, (1978), 56 Ohio St.2d 367, 373, 384 N.E.2d 264. In that case the Court was examining whether the Attorney Examiner’s association with a utility attorney violated former Canon 3(C)(1)(b) of the Judicial Code.⁴ The key to the Court’s analysis was that the appellant “failed to establish that the Attorney-Examiner’s impartiality might reasonably be questioned.” *Id.* at 373. This impartiality concept remains at the heart of the current disqualification rule. Code of Judicial Conduct, Rule 2.11.

Note the recent withdrawal (on March 4, 2022) of Attorney Examiner Gregory Price from the four PUCO investigations of FirstEnergy, including this case. *See* the attachment. The withdrawal related to Examiner Price’s acknowledgement that he “provided legal review and advice to the previous Commission Chairman [Randazzo]

³ Ultimately or now, the PUCO should adopt the Code as a general matter applying to all business of Commissioners and Administrative Law Judges in all matters.

⁴ Cannon 3(1)(b) of the Code of Judicial Conduct has been modified, but much of the substance can now be found in Section 2.11(A)(7).

regarding Am. Sub. H.B.6,” after it was reported in the news. Correspondence filed by Examiner Price (March 4, 2022). It is not sufficiently clear (but should be absolutely clear) what standard the PUCO applied for the withdrawal. Adopting the Ohio Code of Judicial Conduct will provide more clarity for the PUCO, parties and the public in such matters.

C. Applying the Code of Judicial Conduct to PUCO commissioners and administrative law judges is consistent with the existing applicability of the Ohio Rules of Professional Conduct for Attorneys to lawyers who practice at the PUCO.

Applying the Code of Judicial Conduct to PUCO Commissioners and Attorney Examiners is consistent with the Ohio Rules of Professional Conduct that are applied to attorneys (including attorneys who appear before PUCO commissioners and administrative law judges). The preamble to the Ohio Rules of Professional Conduct states that “[a] lawyer should seek improvement of the law, ensure access to the legal system, advance the administration of justice and exemplify the quality of service rendered by the legal profession***. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”

Professional Conduct Rule 8.4(d) also states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. This is further explained in Comment 5 to Rule 8.4(d). That Comment notes that

“lawyers holding public office assume legal responsibilities going beyond those of other citizens.”

D. Other executive agencies in Ohio have adopted a code of conduct for hearing officers/administrative law judges, including one agency that has adopted the Ohio Code of Judicial Conduct for its hearing examiners.

At least one agency in Ohio has bound itself to follow the Ohio Code of Judicial Conduct. Hearing examiners overseeing adjudication proceedings before the Ohio Environmental Protection Agency (“OEPA”) “shall behave in the manner prescribed for judges generally in the ‘Ohio Code of Judicial Conduct’ (2010).” O.A.C. 3745-47-20(D). In other words, the Ohio EPA has specifically applied the Judicial Code to its hearing examiners, by rule.

Commissioners and employees of the Ohio Industrial Commission and Bureau of Worker’s Compensation are required, by rule, to avoid the appearance of impropriety. Specifically, O.A.C. 4123-15-03(G) states:

It is understood that standards of ethical conduct may involve a myriad of situations. The good conscience of individual employees shall remain the best guarantee of the moral quality of their activities. The overall intent of this code of ethics is that employees avoid any action, whether or not prohibited by the preceding provisions, which result in, or create the appearance of: (1) Using public office for private gain, or (2) Giving preferential treatment to any person, entity, or group.

The PUCO should make its Commissioners and Examiners subject to the Code of Judicial Conduct for this case.

E. Public utilities commissions in a number of states have adopted codes of conduct for hearing officers and administrative law judges.

Outside of Ohio, there are a number of states that apply codes of judicial conduct or have adopted their own codes of conduct applicable to administrative law judges.

See, e.g., Judging Ethics for Adm. Law Judges: Adoption of A Uniform Code of Judicial Conduct for the Adm. Judiciary, 11 Widener J. Pub. L. 7, 19–20 (2002) (providing a comprehensive overview of how various states handle ethical considerations in the context of administrative law judges).

In Pennsylvania, for example, the public utility commission requires its administrative law judges to comply with its own Code of Ethics by rule. *See* 66 PA. Cons. Stat. § 319 (1999) (“Each commissioner and each administrative law judge shall conform to the following code of ethics for the Public Utility Commission. A commissioner and an administrative law judge must ... avoid impropriety and the appearance of impropriety in all activities***.”)

Building on this, Section 1.2 of the Pennsylvania PUC’s “Office of Administrative Law Judge Operating Procedures Manual” specifically requires that administrative law judges and commissioners “comply with the Commission’s Code of Ethics as well as with other relevant Codes of Conduct.” *See* Administrative Law Judge, Operating Procedure Manual citing to 66 PA. Cons. Stat. § 319 (1999) (“Each commissioner and each administrative law judge shall conform to the following code of ethics for the Public Utility Commission. A commissioner and an administrative law judge must ... avoid impropriety and the appearance of impropriety in all activities....”)

As another example, Maryland requires that all of its administrative law judges avoid the appearance of impropriety:

Public confidence in the administrative judiciary is eroded by irresponsible or improper conducts by ALJs. An ALJ must avoid all impropriety and appearance of impropriety...The test for appearance of impropriety is whether the conduct would create, in reasonable minds, a perception that the ALJ’s ability to carry out adjudicatory

responsibilities with integrity, impartiality and competence is impaired.

See the Code of Judicial Conduct for Administrative Law Judges by the Maryland Office of Administrative Hearings (“OAH”).

In fact, the preface to Maryland’s Code of Judicial Conduct for Administrative Law Judges states: “[b]ased on extensive review and research by its Ethics and Professionalism Committee, OAH has adopted this Code of Judicial Conduct (“Code”) for ALJs at the OAH. Sources include the Model Code for federal Administrative Law Judges,¹³ the Maryland Code of Judicial Conduct, the Maryland Code of Conduct for Judicial Appointees (2010), the Maryland Public Ethics Law, Title 5, General Provisions Article, Annotated Code of Maryland, the Maryland Administrative Procedure Act, State Government Article, sections 10-201 through 10- 226, State Personnel and Pensions Article section 2-304, governing political activity of State employees, and the Model American Bar Association (“ABA”) Code of Judicial Conduct.”

With respect to judicial disqualification, the Supreme Court of Ohio has stated that "[p]reservation of public confidence in the integrity of the judicial system is vitally important,' and '[a]n appearance of bias can be just as damaging to public confidence as actual bias.'" *In re Disqualification of Burge*,¹³⁸ Ohio St.3d 1271, 2014-Ohio-1458, ¶ 9, 7 N.E.3d 1211, quoting *In re Disqualification of Murphy*,¹¹⁰ Ohio St.3d 1206, 2005-Ohio-7148, ¶ 6, 850 N.E.2d 712. Thus, the Code of Judicial Conduct provides that "[a] judge shall *disqualify* himself or herself in any proceeding in which_ the judge's impartiality might reasonably be questioned[.]" Jud. Cond. R. 2.11(A).

“This reputational interest is not a fanciful one; rather, public confidence in the judiciary is integral to preserving the justice system. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. To perform its high function in the best way justice must satisfy the appearance of justice.” *Wersal v. Sexton*, 674 F.3d 1010 at 31*(Ct. App. 8th Cir. 2012).

III. CONCLUSION

The PUCO should grant the OCC’s Motion for the PUCO to adopt the Ohio Code of Judicial Conduct for its Commissioners and Examiners. And, at a minimum, the Judicial Code should be adopted in the PUCO’s other three investigation cases regarding FirstEnergy. For the Ohio public, there really needs to be a full-scale investigation of the PUCO regarding the relationship between FirstEnergy and the former PUCO chair – and all related matters wherever that leads. But a start is for the PUCO to now adopt the Supreme Court’s Ohio Code of Judicial Conduct.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ Maureen R. Willis

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for the PUCO to Make Its Commissioners and Administrative Law Judges Subject to the Ohio Code of Judicial Conduct for Their Administration of Justice was served on the persons stated below via electronic transmission, this 7th day of July 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:

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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.



Public Utilities Commission

Mike DeWine, Governor
Jenifer French, Chair

Commissioners

M. Beth Trombold
Lawrence K. Friedeman
Dennis P. Deters
Daniel R. Conway

March 4, 2022

Chair Jenifer French
Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, Ohio 43215

Dear Chair French:

During my tenure at the Commission, it has been my privilege to review legislation pending before the General Assembly and advise the Chair and Commissioners regarding legal issues raised by such legislation. I have also presided over many cases involving the subsequent implementation of legislation for which I had previously provided legal advice. This included Am. Sub. H.B. 6 among many other bills.

I have been presiding over the four separate investigations opened by the Commission into the conduct of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company during the passage of Am. Sub. H.B. 6. However, due to the fact that I provided legal review and advice to the previous Commission Chairman regarding Am. Sub. H.B. 6, and in light of the truly unique circumstances presented today, I have concluded that it is in the best interest of the Commission that I withdraw from presiding over these four proceedings.

I have full confidence that the Commission under your leadership will continue to follow the facts wherever they may lead in these investigations. It is an honor to work with you, the Commissioners, and the dedicated professional staff at the Commission.

Sincerely,

Gregory A. Price
Senior Attorney Examiner
Chief, Electric and Energy Section
Legal Department

**This foregoing document was electronically filed with the Public Utilities
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in

**Case No(s). 20-1502-EL-UNC, 20-1629-EL-RDR, 17-2474-EL-RDR, 17-0974-EL-
UNC**

Summary: Correspondence letter electronically filed by Ms. Mary E. Fischer on
behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio

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Commission of Ohio Docketing Information System on**

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in

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

Summary: Motion Motion for the PUCO to Make Its Commissioners and
Administrative Law Judges Subject to the Ohio Code of Judicial Conduct for Their
Administration of Justice by Office of the Ohio Consumers' Counsel electronically
filed by Ms. Alana M. Noward on behalf of Willis, Maureen R.