

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Ohio	)	
Edison Company, The Cleveland Electric	)	
Illuminating Company, and The Toledo	)	Case No. 17-974-EL-UNC
Edison Company's Compliance with	)	
R.C. 4928.17 and the Ohio Adm. Code	)	
Chapter 4901:1-37.	)	

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**INTERLOCUTORY APPEAL,  
REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS,  
AND  
APPLICATION FOR REVIEW  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL,  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP,  
INTERSTATE GAS SUPPLY, INC.,  
AND NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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July 26, 2022

**BEFORE  
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In the Matter of the Review of the Ohio     )  
Edison Company, The Cleveland Electric    )  
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The PUCO Attorney Examiners' ruling issued last Thursday, if not clarified, could essentially shut down the Ohio Consumers' Counsel's subpoenaed deposition of former FirstEnergy executive Ebony Yeboah-Amankwah initiated last Thursday in Akron. The Attorney Examiners' ruling came after FirstEnergy Corp.'s counsel and counsel for Ms. Yeboah Amankwah objected to cross-examination based on an alleged communication from the U.S. Attorney's Office that FirstEnergy Corp. had unilaterally solicited without all parties' present. Appellants – OCC, the Ohio Manufacturers' Association Energy Group ("OMAEG"), the Northeast Ohio Public Energy Council ("NOPEC"), and Interstate Gas Supply Inc. – take this interlocutory appeal asking the PUCO Commissioners to reverse the Attorney Examiners' ruling.

Ohio consumers should not be sacrificed because FirstEnergy Corp. has been accused of a crime. The PUCO has a legal duty to protect Ohio consumers from unlawful

and unreasonable electric rates. The PUCO's response to FirstEnergy Corp.'s interference with and attempt to thwart the deposition should be "no." And the PUCO should reject any such attempts to thwart parties' efforts to obtain relevant information through proper discovery. Additionally, any allegations of a concern held by an attorney with the U.S. Attorney's Office should be filed in the public docket and accompanied by a motion for protective order and an affidavit to substantiate any such concern. Parties should then be afforded an opportunity to respond. To do otherwise thwarts transparency and justice for consumers.

Specifically, FirstEnergy Corp.'s counsel, Mr. Hollingsworth, allegedly called the U.S. Attorney's Office after receiving an adverse PUCO ruling earlier that morning that allowed Appellants to continue questioning former FirstEnergy executive Ebony Yeboah-Amankwah. Ms. Yeboah Amankwah served as Chief Ethics Officer and designated compliance officer for corporate separation from 2017 to 2020 before being "separated" from FirstEnergy in the wake of the H.B.6 scandal. The call was an attempt to circumvent the morning ruling by the Attorney Examiner which allowed parties to "ask any questions related to the documents that have already been produced in the discovery phase of this proceeding."<sup>1</sup>

FirstEnergy Corp.'s counsel provided the PUCO Examiners with a rendition of a purported phone call with Emily Glatfelter, Assistant U.S. Attorney and the lead prosecutor for the DOJ investigation. FirstEnergy Corp.'s counsel. stated that "DOJ has an objection to lines of questioning on the record in these proceedings about Sam

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<sup>1</sup> Yeboah Amankwah Deposition Transcript at 66 (Jul. 21, 2022).

Randazzo, about Sustainability Funding Alliance.”<sup>2</sup> FirstEnergy Corp.’s counsel further relayed that the Assistant U.S. Attorney allegedly was available to speak to the Attorney Examiner about the issue and the DOJ’s position (but seemingly outside the presence of OCC and other parties seeking discovery).<sup>3</sup> Of course neither the U.S. Attorney, nor the Assistant U.S. Attorney who spoke with FirstEnergy Corp.’s Counsel made such a statement on the record. Nor was a motion filed by the U.S. Attorney seeking to limit the deposition of Ms. Yeboah Amankwah.

FirstEnergy Corp. used the communication it states it solicited from an Assistant U.S. Attorney to persuade the PUCO Examiners to essentially shut down the deposition of Ms. Yeboah-Amankwah unless the rulings are clarified. The Attorney Examiners ruled that “any non-public information that relates to the differed (sic) prosecution agreement that may interfere with the federal investigations, should not be permitted, and we will not permit such questions to be asked.”<sup>4</sup>

The Attorney Examiner explained that “Mr. Hollingsworth [FirstEnergy Corp.’s counsel] made it very clear, based on the representation from the DOJ that that is taking it one step too far” and “we will go ahead and *pump the breaks* (sic), as it comes to that particular area of questioning.”<sup>5</sup> The Attorney Examiner broadly defined the precluded areas of questioning as “any non-public information related to the deferred prosecution agreement, so anything that’s referenced” there.<sup>6</sup>

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<sup>2</sup> *Id.* at 172.

<sup>3</sup> *Id.*

<sup>4</sup> Tr. at 188.

<sup>5</sup> Tr. at 192 (emphasis added).

<sup>6</sup> Tr. at 194.

*The Attorney Examiners' broad ruling is far reaching and devastating for the PUCO and Appellants' investigation of FirstEnergy Utilities and corporate separation violations.* Counsel representing FirstEnergy Corp., FirstEnergy Utilities, and former FirstEnergy executives will likely use the ruling to argue that it bars most if not all questions about key documents produced in discovery that FirstEnergy Corp. claims are confidential even though the deposition is to take place in a confidential, non-public session. Those documents include evidence of FirstEnergy Corp.'s misallocation of costs for services rendered by the former PUCO Chair, for FirstEnergy Solutions' benefit but charged to FirstEnergy Utilities and their consumers.<sup>7</sup> If true, this would be a violation of the corporate separation rules and law at issue in this corporate separation proceeding.

Those misallocations were also a part of the PUCO delivery capital investment rider investigation, Case No. 20-1629-EL-UNC. That investigation proceeded almost unimpeded by the DOJ's criminal investigation, unlike the apparent shutdown happening now in this case. The misallocations and the consulting arrangement with Sustainability Funding Alliance (Mr. Randazzo's organization) are germane to this corporate separation proceeding and to the PUCO's political spending investigation in Case No. 20-1502-EL-UNC.

It seems that the Attorney Examiners' rulings may block the public's right to know how the former PUCO chair may have disadvantaged Ohio consumers in favor of the FirstEnergy Utilities and their affiliates. Note that, in the U.S./FirstEnergy Deferred Prosecution Agreement, FirstEnergy Corp. acknowledged that it intended to bribe Mr. Randazzo by paying him \$4.3 million "to further FirstEnergy Corp.'s interests relating to

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<sup>7</sup> FirstEnergy Corp. Form 10-Q at 69 (Apr. 22, 2021).

passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”<sup>8</sup> That shocking circumstance violated Ohio’s regulatory laws and rules concerning rates and utility service and corporate separation, which the PUCO has exclusive jurisdiction over. (To date, Mr. Randazzo has not been charged with a crime.)

All of these areas of inquiry are crucial to determining whether the FirstEnergy entities violated Ohio’s corporate separation law and rules. Proper cost allocation is one of the cornerstones of corporate separation. If costs associated with former Chair Randazzo and Sustainability Funding Alliance were improperly allocated to the Ohio utilities, utility consumers likely paid unlawful subsidies that the law is supposed to protect them from paying.

The Attorney Examiners’ ruling that Appellants challenge in this appeal appears to be a departure from the Examiner’s ruling earlier in the deposition. Earlier, the Examiner allowed parties to “ask any questions related to the documents that have already been produced in the discovery phase of this proceeding.”<sup>9</sup>

Further, the ruling is a departure from a prior written Attorney Examiner ruling allowing OCC to depose Ms. Yeboah Amankwah, where Ms. Yeboah Amankwah’s motion to quash OCC’s subpoena was overruled.<sup>10</sup> The Appellants object and appeal this ruling.

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<sup>8</sup> *U.S v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (Jul. 22, 2021).

<sup>9</sup> Tr. at 66.

<sup>10</sup> *In the Matter of the Review of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s Compliance with R.C. 4828.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶ 38 (Jun. 16, 2022).

An immediate determination is needed, per O.A.C. 4901-1-15(B), to avoid undue prejudice to the Appellants and to the public. The Attorney Examiners' ruling greatly and unduly prejudices the Appellants' rights to full and ample discovery in PUCO proceedings under R.C. 4903.082 and case preparation under O.A.C. 4901-1-16 et seq. And the Attorney Examiners' ruling greatly and unduly prejudices the public's interest in a full investigation of whether the FirstEnergy Utilities (and their affiliates) violated Ohio law and rules including those governing corporate separation.

Per O.A.C. 4901-1-15, the Appellants ask that the legal director, deputy legal director, attorney examiner, or presiding hearing officer certify this appeal to the PUCO. Upon consideration of the interlocutory appeal the PUCO should reverse or modify the Attorney Examiners' July 21, 2022 ruling. (*See attached*). The ruling is inconsistent with the Attorney Examiner's earlier deposition ruling and the Attorney Examiner's June 16, 2022 Entry that ruled "...over 470,000 pages of documents have been produced ...and parties will be permitted to ask questions related to those documents during both depositions."<sup>11</sup> The ruling also presents a new or novel question of interpretation, law or policy as it addresses the scope of discovery in PUCO cases involving a parallel criminal proceeding.

Coincidentally, FirstEnergy's Corp.'s objections based on claimed interference with criminal matters just happen to also prevent further investigation into FirstEnergy's Ohio scandals, PUCO audits, and the misallocations of costs to Ohio consumers. Unfortunately for consumer justice, that is not necessarily mere coincidence.

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<sup>11</sup> Entry at ¶ 39 (Jun. 16, 2022).



The reasons for granting this interlocutory appeal are more fully stated in the following memorandum in support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The deposition at issue is of a former FirstEnergy executive (Ebony Yeboah-Amankwah) who was apparently “separated” from FirstEnergy Corp. after FirstEnergy’s scandal. The deponent’s prior position at FirstEnergy Corp. and with the Ohio Utilities has an important connection with corporate separation.

The corporate separation issues regarding FirstEnergy’s management and affiliates in the wake of the H.B. 6 scandal are unprecedented in Ohio. Federal prosecutors called the H.B. 6 scandal “the largest bribery scheme ever” in Ohio.<sup>12</sup> FirstEnergy Corp. fired its CEO and two other top executives on October 29, 2020. The firings occurred the same day that two of the criminal defendants in *U.S. v. Householder*<sup>13</sup> entered guilty pleas.<sup>14</sup>

FirstEnergy Corp.’s October 29, 2020 SEC filing explained that a committee of independent members of FirstEnergy’s Board of Directors was directing an internal

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<sup>12</sup> N. Reimann, *Ohio Speaker of the House Arrested in State’s ‘Largest Bribery Scheme Ever,’* Forbes.com (Jul. 21, 2020).

<sup>13</sup> *U.S. v. Larry Householder, et al.*, Case No. 1:20-cr-00077, Complaint (S.D. Ohio) (Jul. 21, 2020).

<sup>14</sup> J. Mackinnon, *FirstEnergy fires CEO Chuck Jones after 2 plead guilty in Householder bribery scheme*, Akron Beacon-Journal (Oct. 29, 2020).

investigation regarding FirstEnergy’s H.B. 6 activities. The Board concluded that certain executives’ actions related to H.B. 6 had violated company policies and its code of conduct.<sup>15</sup> As stated, the deponent is Ebony Yeboah Amankwah, the former Chief Ethics Officer and designated compliance officer on matters of corporate separation for 2017 through 2020.

Later SEC filings revealed that FirstEnergy Corp., through the course of its internal investigation, had discovered a \$4.3 million lump sum payment as well as several years of additional payments to a firm (Sustainability Funding Alliance) controlled by the former PUCO Chair. These payments were apparently in return for “consulting” services provided by the Sustainability Funding Alliance to FirstEnergy Solutions.<sup>16</sup>

To add insult to injury, it was revealed that costs related to Sustainability Funding Alliance were misallocated to the FirstEnergy Ohio Utilities.<sup>17</sup> Included in the misallocated costs were various lobbying and consulting contracts, some of which involved former Chair Randazzo and Sustainability Funding Alliance. Costs misallocated to the Ohio Utilities (and then to their consumers) are costs that should have been allocated to FirstEnergy Utilities’ competitive affiliates. It’s the type of cross-subsidization that Ohio’s corporate separation law (R.C. 4928.17) and the PUCO’s rules are intended to prohibit, for consumer protection.

FirstEnergy Advisors (“FEA”) (the affiliate of the FirstEnergy utilities) publicly disclosed shocking text messages reflecting apparent corporate separation violations and

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<sup>15</sup> FirstEnergy Corp., Form 8-K (Oct. 29, 2020).

<sup>16</sup> See generally, *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1629-EL-RDR Compliance Audit, Expanded Scope (Aug. 3, 2021).

<sup>17</sup> FirstEnergy Corp., Form 10-K (Feb. 18, 2021).

seemingly unlawful *ex parte* communications. The text messages were between Dennis Chack (then President and Manager of FEA) and Charles Jones (then CEO of FirstEnergy Corp., Manager of FEA, and Director of the FirstEnergy’s Ohio utilities). The text messages discuss Mr. Jones’ interaction with former Chair Randazzo toward securing approval of FEA’s application.<sup>18</sup>

In one text message, former FEA President Chack asked about the status of the FEA energy license: “Any luck on talking with Sam on energy license [W]e just received request for additional comments” (March 3, 2020).<sup>19</sup> The next day former FirstEnergy CEO and Ohio FirstEnergy Utilities Director Charles Jones replied relaying that the former PUCO Chair:

*[W]ill get it done for us but cannot just jettison all process. Says the combination of overruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of 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. (Emphasis added.)*<sup>20</sup>

These publicly released texts seem to document corporate separation violations not investigated to date by either of the auditors (Sage Management Consultants and Daymark Energy Advisors) in this corporate separation case.

Attorney Examiners Megan Addison and Jacky Werman St. John ruled during the deposition of Ms. Yeboah-Amankwah “that any non-public information that relates to the differed (sic) prosecution agreement that may interfere with the federal investigation,

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<sup>18</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 the Certification Application of Suvon, Exhibit A (Nov. 2, 2021).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

should not be permitted.”<sup>21</sup> This broad, vague ruling seemingly conflicts with the Attorney Examiner earlier rulings during the deposition and the Attorney Examiner’s June 16, 2022 Entry, which allowed parties to ask deposition questions about the 470,000 pages of documents produced by FirstEnergy Corp.<sup>22</sup>

Such documents were produced to parties under a confidentiality agreement with FirstEnergy Corp. and the parties and are therefore part of the “non-public information” relating to the Deferred Prosecution Agreement that likely would be covered by the Attorney Examiners’ ruling. In other words, FirstEnergy produced 470,000 pages in response to OCC’s discovery and claims that all 470,000 pages are confidential. They’re not. The pages even include public filings and other already public (non-confidential) information.

In addition, the U.S./FirstEnergy Corp. Deferred Prosecution Agreement deals with misallocated costs relating to Sustainability Funding Alliance and Generation Now. Those misallocated/unsupported costs were identified by the PUCO-appointed auditor, Blue Ridge, as “vendor payments” and include a series of payments to Sustainability Funding Alliance, dating back to 2014.<sup>23</sup> Such payments should be an open matter for deposition questioning, but may not be under the Attorney Examiners’ July 21, 2022 afternoon ruling.

This appeal should be certified to the Commission. The PUCO should reverse or modify the Attorney Examiners’ latter deposition ruling and allow Appellants’ deposition

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<sup>21</sup> Tr. at 188.

<sup>22</sup> Entry (Jun. 16, 2022).

<sup>23</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1629-EL-RDR, Compliance Audit, Expanded Scope at 39-40 (Aug. 3, 2021).

questioning to proceed in accordance with the Attorney Examiner's earlier deposition ruling and the June 16, 2022 Entry. Without permitting questions regarding all relevant topics (as it seems the ruling implies), it is impossible to fully investigate whether FirstEnergy complied with Ohio law and rules governing corporate separation. Allowing questioning to proceed would be in compliance with Ohio law and rules for discovery and case preparation. Reversal would further the public imperative for this investigation and the PUCO's other three investigations to proceed and to "complement but not supplant" the DOJ investigation.<sup>24</sup>

## **II. STANDARD OF REVIEW**

The PUCO will review an attorney examiner's ruling if the attorney examiner (or other authorized PUCO personnel) certifies the appeal.<sup>25</sup> The standard applicable to certifying an appeal is that "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question."<sup>26</sup> Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.<sup>27</sup>

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<sup>24</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1629-EL-RDR Entry at ¶ 14 (Dec. 15, 2021).

<sup>25</sup> O.A.C. 4901-1-15(B).

<sup>26</sup> *Id.*

<sup>27</sup> O.A.C. 4901-1-15(E).

### III. REQUEST FOR CERTIFICATION

**A. The Attorney Examiners' ruling during OCC and other Appellants' deposition of Ms. Yeboah-Amankwah is a departure from past precedent. The ruling also presents a new or novel question of interpretation, law or policy.**

This appeal should be certified by the legal director, deputy legal director, attorney examiner, or presiding hearing officer, per O.A.C. 4901-1-15(B). The Attorney Examiners improperly ruled during Ms. Yeboah-Amankwah's deposition that "any non-public information that relates to the prosecution agreement that may interfere with the federal investigation, should not be permitted."<sup>28</sup>

This ruling is a departure from the Attorney Examiner's earlier ruling during the deposition and the Attorney Examiner's ruling in the June 16, 2022 Entry that permitted parties to ask deposition questions about the 470,000 pages of documents produced in discovery.<sup>29</sup> The ruling also presents a new or novel question of interpretation, law or policy as it addresses the scope of discovery in PUCO cases involving a parallel criminal proceeding. And the ruling relies on an opinion from an attorney in the U.S. Attorney's Office that may have been misinformed by a party (FirstEnergy Corp.) seeking to shut down inquiry into corporate separation violations. Permitting the ruling to stand would establish a limitation on parties' statutory right under R.C. 4903.082 to full and ample discovery in PUCO proceedings. It could then force the PUCO to reach a conclusion in this proceeding based upon a potentially incomplete record.

Instead of taking a clear, bright-line approach on what may or may not be asked during a deposition, the Attorney Examiners seem to have left it to opposing counsel

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<sup>28</sup> Tr. at 188.

<sup>29</sup> Entry (Jun. 16, 2022).



(representing FirstEnergy Corp. FirstEnergy Utilities and Ms. Yeboah Amankwah) to determine what may “interfere” with the ongoing criminal investigations by the Department of Justice. The Attorney Examiners should have limited their ruling precluding only questioning about violations of federal law described under the Deferred Prosecution Agreement. But they did not.

At the deposition of Ms. Yeboah Amankwah, the Attorney Examiners ruled that “any non-public information that relates to the [deferred] prosecution agreement that may interfere with the federal investigation, should not be permitted.”<sup>30</sup> This ruling is vague, overly broad and caters to obstructive tactics by opposing counsel. And it plays into the hands of FirstEnergy Corp. and the FirstEnergy Utilities by allowing various FirstEnergy entities (and others) to self-define what may interfere with the federal investigation. It also encourages off the record, unilateral discussions with the U.S. Attorney’s Office with some but not all parties, in contrast to the PUCO’s established open, public process for challenging depositions (i.e., a motion for protective order.)<sup>31</sup>

The Attorney Examiners’ ruling was based upon FirstEnergy Corp.’s counsel’s bald assertions about a conversation with an attorney from the U.S. Attorney’s Office. The ruling will likely be construed by the FirstEnergy entities to enable even more objections to questions about confidential documents produced in discovery that touch upon the Deferred Prosecution Agreement.

Those documents include evidence of FirstEnergy Corp.’s admitted misallocation of costs for services by the former PUCO Chair, for FES’s benefit but charged to

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<sup>30</sup> Tr. at 188.

<sup>31</sup> O.A.C. 4901-1-24(A).

FirstEnergy Utilities and their consumers, in violation of corporate separation rules and law.<sup>32</sup> Those misallocations were also part of the PUCO delivery capital investment rider investigation, Case No. 20-1629-EL-UNC, which was able to proceed virtually unimpeded by the DOJ's criminal investigations related to H.B. 6. And the misallocations and the consulting arrangement with Sustainability Funding Alliance are germane to this corporate separation proceeding and the political spending investigation in Case No. 20-1502-EL-UNC.

The Attorney Examiner's ruling will also likely be construed (improperly) by opposing counsel to ban questions about publicly disclosed *ex parte* communications incidental to the cost misallocations. That may relate to the same set of facts in the Deferred Prosecution Agreement.<sup>33</sup> Yet, the amounts of the cost misallocations are public information contained in the Blue Ridge audit report. How and why the cost misallocations occurred and why it was inappropriate to allocate the costs to the FirstEnergy Utilities has not been answered (as noted by the auditor in Case No. 20-1629-EL-RDR). Parties should not be prohibited from seeking answers to these important questions relevant to the corporate separation audit.

Questions relating to these transactions should be allowed during depositions of FirstEnergy executives, present and former. Yet under the Attorney Examiners' ruling, counsel will likely continue to instruct their clients not to answer deposition questions.

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<sup>32</sup> FirstEnergy Corp. Form 10-Q at 69 (Apr. 22, 2021).

<sup>33</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 the Certification Application of Suvon, Exhibit A (Nov. 2, 2021).

That is because, in their view, questions dealing with this information might interfere with the U.S. Attorney's investigation.

The Attorney Examiners' ruling also conflicts with earlier rulings during Ms. Yeboah-Amankwah's deposition.<sup>34</sup> And it is a departure from a June 16, 2022 Attorney Examiner Entry that "...over 470,000 pages of documents have been produced ...and parties will be permitted to ask questions related to those documents during both depositions."<sup>35</sup>

Therefore, the criteria in O.A.C. 4901-1-15(B) are met for finding a departure from past precedent. The question presented in this appeal is also new or novel, involving the proper scope of discovery in PUCO cases where a parallel criminal investigation is occurring.

Alternatively, the PUCO should *waive* the requirement for certification of this appeal under O.A.C. 4901-1-38(B)<sup>36</sup> given the extraordinary cause shown. There is the gravity of the corruption that led to the investigation of FirstEnergy Corp. and the Ohio Utilities.

Given the PUCO's stated objective to get at the facts, and the effect of the Attorney Examiners' ruling preventing parties from getting the facts, the ruling merits consideration by the full PUCO. Certification should be granted or waived.

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<sup>34</sup> Tr. at 66.

<sup>35</sup> Entry at ¶ 39 (Jun. 16, 2022).

<sup>36</sup> This rule empowers the PUCO to "waive any requirement of this chapter for good cause shown, other than a requirement mandated by statute from which no waiver is permitted."

**B. An immediate determination is needed to prevent undue prejudice.**

This appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice<sup>37</sup> to Appellants, Ohio consumers and the public at large. Even if the PUCO ultimately reverses the Attorney Examiners’ rulings after this matter is heard and briefed, the Appellants and customers will be greatly prejudiced. The Appellants will have suffered the denial of (1) their ample discovery rights under R.C. 4903.082 and O.A.C. 4901-1-16 et seq. during the deposition of Ms. Yeboah-Amankwah and other FirstEnergy related witnesses. And (2) they will have lost a complete and timely investigation of whether FirstEnergy’s H.B. 6-related activities and its relationship with the former PUCO chair violated Ohio law (*e.g.*, R.C. 4928.17) as well as the corporate separation rules under the Ohio Administrative Code.

**IV. APPLICATION FOR REVIEW**

In the U.S./FirstEnergy Deferred Prosecution Agreement, FirstEnergy Corp. admitted to a felony charge of honest services wire fraud based on its employees’ H.B. 6-related conduct.<sup>38</sup> Parts of the Deferred Prosecution Agreement detail FirstEnergy Corp.’s activities involving former FirstEnergy Corp. employees, PUCO Chair Randazzo and his Sustainability Funding Alliance.

As background, OCC filed a motion on February 7, 2022 to subpoena Ms. Ebony Yeboah-Amankwah for deposition.<sup>39</sup> Ms. Yeboah-Amankwah is FirstEnergy Corp.’s former Vice President, General Counsel and Chief Ethics Officer. She was “separated”

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<sup>37</sup> O.A.C. 4901-1-15(B).

<sup>38</sup> *Id.*

<sup>39</sup> Motion for Subpoena Duces Tecum of Ebony Yeboah-Amankwah (Feb. 7, 2022).

from FirstEnergy on November 8, 2020. That separation occurred after FirstEnergy Corp.'s internal H.B. 6 investigation revealed that she engaged in "inaction and conduct that the Board determined was influenced by the improper tone at the top."<sup>40</sup> Ms. Yeboah Amankwah moved to quash the subpoena.<sup>41</sup> That motion was overruled by Attorney Examiner Entry issued June 16, 2022. OCC was rightfully allowed to proceed with the deposition.<sup>42</sup>

The deposition began on July 21, 2022. OCC and the other Appellants participated in the deposition. At the deposition, Ms. Yeboah Amankwah's attorney (and attorneys for FirstEnergy Corp. and the FirstEnergy Utilities) repeatedly objected and instructed her not to answer questions relating to FirstEnergy Corp.'s payments to Sustainability Funding Alliance and former Chair Randazzo. The attorneys argued, among other things, that such questions would improperly interfere with the U.S. Attorney's criminal investigation into the H.B. 6 matter. The Appellants completely disagree. The questions being asked are about corporate separation violations and the underlying facts thereto; the Appellants are not asking questions regarding violations of criminal laws.

Thursday morning, the Attorney Examiner overruled the objections and ordered that the parties may ask questions relating to FirstEnergy Corp.'s payments to the Sustainability Funding Alliance. The Attorney Examiner ruled as follows:

In the June 16, 2022 entry in this proceeding, we did deny the motion to quash and allow this deposition to proceed. And based on that, I will remind the parties that the discovery threshold is a very low bar, in that it's only

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<sup>40</sup> FirstEnergy Corp. Form 10-K at 125 (Feb. 18, 2021).

<sup>41</sup> Motion of Ebony Yeboah-Amankwah to Quash Subpoena (Mar. 7, 2022).

<sup>42</sup> Entry at ¶ 38 (Jun. 16, 2022).

allowable for information reasonably calculated to lead discovery of admissible evidence, pursuant to Ohio Admin Code 4901.116(b) (sic). And while we note that these questions are being permitted as of today for the purposes of the deposition, we again reiterate the relevancy of this proceeding and this line of questioning will be addressed at the hearing.

Specifically, to the issue regarding certain documents pertaining to the DOJ or FCC (sic) investigations, we did note in that same entry that documents that had already been produced, we would allow parties to ask questions related to those documents, during those depositions subject to that ruling. That's paragraphs 38 and 39 of this June 16, 2022 entry. If we do tread into areas that have otherwise been deemed confidential, I believe, that we already have an adequate means of making sure that that information is not inadvertently disclosed in the public record by accessing the confidential portion of the deposition. That has already been set up.<sup>43</sup>

The Attorney Examiner also ruled:

[W]e do tend to agree with OCC that questions regarding the use agreement should be permitted, as to whether it was to violations of the Corporate Separation plan, specifically, Ms. Willis, is certainly entitled to ask whether or not these agreements were entered into with the express purpose to benefit the utilities competitive affiliate, and related questions of that nature.

So we do believe, despite the Company's arguments, otherwise, the entry and Case No. 2016 29 (sic) on December 15, 2021 was directed and targeted toward a violation of R.C. 4928.145, and that will not have barring (sic) on questions related to those agreements, as it relates to the Corporate Separation plan.<sup>44</sup>

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<sup>43</sup> Tr. at 64-65.

<sup>44</sup> *Id.* at 78-79.

The Appellants submit that these Attorney Examiner rulings (as well as the June 16, 2022 Entry cited) are the correct rulings for the scope of deposition questioning in this corporate separation proceeding.

But then, Thursday afternoon these correct rulings appear to have been reversed by the Attorney Examiners. The reversal was based on an off-the-record conversation arranged between FirstEnergy Corp. and an Assistant U.S. Attorney.

Following the morning rulings permitting parties to go forward with questioning, FirstEnergy Corp.'s attorney allegedly called the U.S. Attorney's Office. It was a last-ditch effort to block the Appellants from asking questions about payments made to the former PUCO Chair and Sustainability Funding Alliance that were allocated to the Ohio Utilities, and therefore, Ohio consumers.

Appellants were not invited to the discussion with the Assistant U.S. Attorney, and therefore, are unaware of the exact communication shared or what characterizations FirstEnergy Corp. made during its claimed call to the U.S. Attorney's office. That allegedly prompted an Assistant U.S. Attorney to allegedly object to "lines of questioning on the record in these proceedings about Sam Randazzo, about Sustainability Funding Alliance."<sup>45</sup> And Appellants are asked to simply accept FirstEnergy Corp.'s rendition of the Assistant U.S. Attorney's alleged response to the phone call.

OCC sought to have sworn affidavits filed by both the U.S. Attorney's Office and FirstEnergy Corp. as to the conversation between the Assistant U.S. Attorney and FirstEnergy Corp.'s attorney. But the Attorney Examiner declined to require affidavits. She ruled that "I will not be requiring or asking any additional process, as to these

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<sup>45</sup> *Id.* at 172.

rulings, and, I believe, I've given my basis for providing my rulings and we will move on from there.”<sup>46</sup>

The PUCO Commissioners should reverse this ruling by the PUCO's Attorney Examiners, per O.A.C. 4901-1-15. The Examiners incorrectly precluded or will preclude cross-examination of Ms. Yeboah Amankwah on “any non-public information that relates to the differed (sic) prosecution agreement that may interfere with the federal investigations.” Justice is being denied for Appellants and the public.<sup>47</sup>

This ruling deviates from earlier rulings during the deposition and the Attorney Examiner's Entry of June 16, 2022, which stated “...over 470,000 pages of documents have been produced ...and parties will be permitted to ask questions related to those documents during both depositions.”<sup>48</sup>

The ruling will likely be used by opposing parties to shut down any questions that mention former Chair Randazzo or Sustainability Funding Alliance. That would be unfair and contrary to parties' full and ample discovery rights under R.C. 4903.082 and O.A.C. 4901-1-16 et seq. Indeed, there is a low bar to meet for being able to conduct discovery, as recognized by the Attorney Examiner.<sup>49</sup> The rule merely requires parties to show that the information sought is reasonably calculated to lead to the discovery of admissible evidence.

The problem for justice with the Attorney Examiners' ruling is that it fails to give adequate weight to Appellants' need to discover underlying facts that form the basis for

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<sup>46</sup> Tr. at 195.

<sup>47</sup> Tr. at 188.

<sup>48</sup> Entry at ¶ 39 (Jun. 16, 2022).

<sup>49</sup> Tr. at 64.



unlawful violations of regulatory laws, including R.C. 4928.17, 4903.081, and 4928.145.

The PUCO's investigations into the FirstEnergy Utilities "target activities by the Companies which are subject to our exclusive jurisdiction over rates and utility service."<sup>50</sup>

The Appellants should be able to explore the underlying facts involving key players in the DOJ investigation to establish violations of Ohio regulatory laws. As the PUCO has noted its "investigations complement, but do not seek to supplant, the ongoing criminal investigation by the United States Attorney and the civil action by Ohio attorney General Yost pursuant to Ohio's civil RICO statute."<sup>51</sup>

## V. CONCLUSION

The Appellants' interlocutory appeal of the PUCO Examiners' July 21, 2022 ruling meets the legal standards for certification and for reversing the rulings. For millions of Ohio consumers who deserve justice regarding the FirstEnergy scandals, the PUCO should promptly reverse the Attorney Examiners' ruling and thereby protect due process. The PUCO should allow the Appellants' full and complete discovery for fact-finding to continue. The PUCO should permit thorough questioning of FirstEnergy executives (both past and present) relating to the 470,000 pages of documents produced during discovery, and that questioning includes the deposition at issue.

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<sup>50</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 20-1629-EL-RDR, Entry at ¶ 14 (Dec. 15, 2021).

<sup>51</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 20-1629-EL-RDR, Entry at ¶ 14 (Dec. 15, 2021).

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review was provided electronically to the persons listed below this 26<sup>th</sup> 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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BEFORE THE PUBLIC UTILITIES  
COMMISSION OF OHIO

~~~~~

IN THE MATTER OF THE OHIO EDISON  
COMPANY, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, AND  
THE TOLEDO EDISON COMPANY'S  
COMPLIANCE WITH R.C. 4928.17,  
AND THE OHIO ADMIN CODE  
CHAPTER 4901:1-37

CASE NO. 17-974-EL-UNC

~~~~~

DEPOSITION OF  
EBONY YEBOAH-AMANKWAH

July 21, 2022

10:08 a.m.

Taken at:

Embassy Parkway Suites  
4040 Embassy Parkway  
Fairlawn, Ohio

Kurt M. Spencer, Notary Public

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1 EBONY YEBOAH-AMANKWAH, of lawful  
2 age, called for examination, as provided by the  
3 Ohio Rules of Civil Procedure, being by me  
4 first duly sworn, as hereinafter certified,  
5 deposed and said as follows:

6 MR. FINNIGAN: Good morning, Ma'am.  
7 My name is John Finnigan. I am with the Office  
8 of the Ohio Consumers' Counsel. With me is my  
9 colleague, Ms. Maureen Willis. The first thing  
10 we would like to do today is to enter  
11 everyone's appearance so we know who was here  
12 in attendance at the deposition. So I've done  
13 that for us. Let's go around the table with  
14 the people in the room, and, then, we will do  
15 the ones remotely after that.

16 Marcie, would you like to begin.

17 MS. LAPE: Sure. Marcie Lape from  
18 Skadden & Arps. I am here on behalf of the  
19 Deponent, Ebony Yeboah-Amankwah.

20 MR. FITZGERALD: And joining  
21 Ms. Lape is Pat Fitzgerald from Skadden & Arps.

22 MR. O'CONNOR: And also joining  
23 Ms. Lape is Brian O'Connor from Skadden & Arps.

24 MR. HOLLINGSWORTH: Adam  
25 Hollingsworth from Jones Day on behalf of

1 FirstEnergy Corp.

2 MR. DORINGO: Ryan Doringo, and my  
3 colleague, Mike Gladman, who is remote, of  
4 Jones Day on behalf of Ohio Edison Company, the  
5 Cleveland Electric Illuminating Company and the  
6 Toledo Edison Company.

7 MR. FINNIGAN: That is everyone in  
8 the conference room. Let's go ahead and do the  
9 appearances for the people who are  
10 participating remotely. What I will do is  
11 mention the name of each organization and then  
12 whoever is on the call for that organization  
13 can enter their appearance.

14 Let's first begin with OCC. Is  
15 there anyone participating remotely from OCC?

16 MR. SAUER: Larry Sauer with OCC,  
17 as well, John.

18 MR. HALL: Mike Hall from OCC is  
19 also on.

20 MR. FINNIGAN: Is there anyone  
21 participating remotely from FirstEnergy  
22 Utilities?

23 MR. DORINGO: John, it's just me  
24 and Mike today.

25 MR. FINNIGAN: Okay. Anyone else

1 we went back on the record, after we went off  
2 the record.

3 MR. FINNIGAN: That is on the  
4 record. We are going to go off the record now,  
5 and end the public session, and we are going to  
6 start the confidential session immediately  
7 after that.

8 THE WITNESS: I will read.

9 (Morning session concluded at 4:26 p.m.)

10 (NOTE: The confidential afternoon  
11 session was ruled by the Attorney  
12 Examiners to be moved over and is  
13 heretofore a continuous transcript  
14 with the public morning session  
15 that was just completed.)

16 ATTORNEY EXAMINER: Hello everyone.  
17 Can everyone hear me?

18 MR. HOLLINGSWORTH: Yes, we can.  
19 Thank you. And so Attorney Examiners, we just  
20 wanted to thank you for joining us and  
21 apologize for bothering you this late in the  
22 day. An issue came up during the course of the  
23 deposition that we want to bring to your  
24 attention.

25 So since you joined the deposition

1 earlier today, and made your ruling on the  
2 permissible scope of the deposition, counsel  
3 for OCC has asked a series of questions that  
4 really go to the heart of the ongoing US  
5 Attorney Office prosecution and investigations,  
6 including several questions about HB 6, the  
7 termination of Chuck Jones, other topics  
8 unrelated to Corporate Separation, in addition  
9 to its previously posed questions about  
10 Sustainability Funding Alliance and Sam  
11 Randazzo.

12 And so pursuant to FirstEnergy's  
13 ongoing cooperation obligations to DOJ, we  
14 reached out to the lead prosecutor of the DOJ  
15 investigation to inform her about this  
16 development, since her previous understanding  
17 was that discovery into these topics was stayed  
18 by the Commission in its December 21, 2021  
19 ruling, and she authorized us to represent to  
20 you, the Attorney Examiners, that DOJ has an  
21 objection to lines of questioning on the record  
22 in these proceedings about Sam Randazzo, about  
23 Sustainability Funding Alliance, and is  
24 available, if you would like to speak to her  
25 about the issue and DOJ's position, as it could

1 be an important data point for your decision in  
2 terms of the scope of these depositions.

3 MR. FINNIGAN: Your Honor, this is  
4 John Finnigan from OCC, just to let you know  
5 the circumstances we are under right now, we  
6 are in a confidential session of the  
7 deposition, where only the parties that have  
8 signed a confidentiality agreement with  
9 FirstEnergy Corp have access to the information  
10 that is being discussed, at this time.

11 Since your ruling earlier today  
12 about the questioning that parties were allowed  
13 to do in this deposition was made during the  
14 public session of this deposition, I would ask  
15 that this discussion that we are having now,  
16 also, be in the public session of the  
17 deposition, otherwise, by limiting it to only  
18 parties who have signed the confidentiality  
19 agreement with FirstEnergy Corp, we are  
20 unfairly excluding other parties to this case,  
21 who have a right to know what is being  
22 discussed here.

23 ATTORNEY EXAMINER: Thank you.  
24 Does anyone want to speak to either of those  
25 two issues?

1 MS. BOJKO: Yes, Your Honor. Kim  
2 Bojko with OMA EG would like to speak on both  
3 issues. First of all, I completely disagree  
4 with the FirstEnergy Corporate attorneys'  
5 characterization of the questions being asked.  
6 The questions were background questions leading  
7 up to questions that are directly related to  
8 this case. He didn't even let us get to the  
9 questions related to the case, because we  
10 couldn't properly lay the foundation, in order  
11 to ask if the witness had any knowledge of  
12 either the people, or the subject matter at  
13 issue. Many of the questions were just asking  
14 if she recalled or if she knew about certain  
15 events that happened and not the substance of  
16 the events themselves.

17 So I wholly disagree with the  
18 conversation that these are unrelated to the  
19 Corporate Separation. As you know, any  
20 payments made to these entities or individuals  
21 that were then charged back to the companies,  
22 is a Corporate Separation violation, or could  
23 be, and is directly related to this case, and  
24 these Corporate Separation compliance-type  
25 issues are what is being sought through the



1 discovery of this witness.

2 So I disagree with the  
3 characterization that these questions have  
4 nothing to do with Corporate Separation. I  
5 think that this is completely different than  
6 the criminal proceeding. We are not asking  
7 questions related to the criminal proceeding.  
8 We are asking questions that will go to the  
9 allocation of expenses, which is an issue in  
10 this case.

11 I also think it was improper for  
12 FirstEnergy Corporation's counsel to call the  
13 DOJ's office without all of us on the phone, ex  
14 parte, sort of, not with the Judge, but we  
15 think it was highly inappropriate to hear one  
16 side of the story, and him characterizing  
17 questions the way that he did, which, I am sure  
18 that I will disagree with, because I just  
19 disagreed with his statement. So I think that  
20 was inappropriate.

21 I also think it's inappropriate, as  
22 to the second issue. I think it is  
23 inappropriate that this discussion has been  
24 held in secret in a confidential session. It  
25 should be a public record. Many of the

1 documents have already been released to the  
2 public. This has been discussed in the media  
3 to great lengths. None of the questions that  
4 we had asked them so far have anything to do  
5 with a confidential issue, and should not be in  
6 confidential session, however, I think some of  
7 us reluctantly agreed, when we were on the call  
8 earlier, to just ask the questions in  
9 confidential session.

10 So I think that this discussion and  
11 FirstEnergy's actions of calling the DOJ,  
12 should very much be in the public record and  
13 this whole discussion should be moved to the  
14 public transcript. Thank you.

15 MR. STINSON: Your Honor, this is  
16 Dane Stinson with NOPEC. I agree with OCC's  
17 and OMA EG's positions, especially, the fact  
18 that a ruling was made on the public record,  
19 and, now, we're being asked to modify or change  
20 that ruling on the private non-transparent  
21 record; transparency requires that we have this  
22 discussion on the public record.

23 ATTORNEY EXAMINER: Thank you.  
24 Anyone else?

25 MR. BETTERTON: Your Honor, I'll

1 just jump in real quick. I agree with what you  
2 stated before. And I would just like to admit  
3 that a lot of the questions that were being  
4 asked, and objected to, long predate any  
5 investigation in the criminal proceedings. So  
6 that's another area to consider. But I agree  
7 with what OCC and OMA EG have said.

8 MS. WILLIS: Your Honor, if we  
9 could speak to the merits of the call.

10 MR. FINNIGAN: Your Honor, do you  
11 want to have that discussion now, or do you  
12 want to give us guidance whether this should be  
13 in the public record or in the confidential  
14 session.

15 ATTORNEY EXAMINER: Well, I'm still  
16 mulling that over, Mr. Finnigan. We can  
17 certainly remove portions of the transcript, as  
18 we see fit. So let's continue. Ms. Wills?

19 MS. WILLIS: Mr. Finnigan is  
20 prepared to address it.

21 MR. FINNIGAN: Your Honor, this  
22 goes back to the ruling that the Commission  
23 made in the 2016 29 case, where it said that  
24 the foreign investigations that the Commission  
25 is conducting into the House Bill 6 matters,

1 all target topics that are part of the  
2 Commission's exclusive jurisdiction. And to  
3 that extent, the Commission's investigations  
4 are complementary to the US Attorney's criminal  
5 investigations.

6 We do not see any circumstances,  
7 where FirstEnergy Corp should be permitted to  
8 come in and block any questioning about the  
9 documents that they released. They released  
10 documents that provide information about the  
11 payments to Sustainability Funding Alliance  
12 that was owned by Mr. Randazzo, and they also  
13 entered into deferred prosecution agreement  
14 that admits that those payments happened, and  
15 admits that payments were made to a certain  
16 public official B for engaging in activities  
17 that would benefit FirstEnergy Corp, during his  
18 role as Chair of the Public Utilities  
19 Commission.

20 So all that information is in the  
21 public record through their admission of the  
22 criminal charge of honest services wire fraud.  
23 They signed a statement of facts, where they  
24 laid out all these facts into evidence in the  
25 public record. And now, when we bring in

1 former employees from the company, they want to  
2 stop us from asking any questions about it. So  
3 we don't really understand the argument, as to  
4 why this should be confidential, when all that  
5 information is in the public domain.

6 At the end of the day, this case  
7 goes to issue of something that is in the  
8 Commission's exclusive jurisdiction, and that  
9 is whether costs were improperly allocated to  
10 utility customers for lobbying on behalf of the  
11 utility. And the Commission really needs to  
12 take action here to protect the consumers, and  
13 to really fulfill what it said all along, that  
14 it wanted to act on a transparent basis with a  
15 full set of facts, and we can't get the full  
16 set of facts, if we are not allowed to ask  
17 questions of witnesses about the documents that  
18 we've already received.

19 Now, it seems like, if FirstEnergy  
20 Corp really had any concern that these matters  
21 were confidential and might interfere with the  
22 US Attorney's investigation, they might have  
23 contacted the US Attorney, before giving us  
24 about 500,000 pages of documents that contained  
25 the same information that we want to ask

1 questions about. Why was it not interfering  
2 with the criminal investigation to give us all  
3 those documents, and, now, it is interfering  
4 with investigation to ask questions about the  
5 documents that they gave us?

6 Also, the whole idea about us  
7 taking Ms. Yeboah-Amankwah's deposition in the  
8 first place was the subject of a motion to  
9 quash that the Commission ruled on. They could  
10 have brought up these arguments in the motion  
11 to quash; they didn't. They could have  
12 notified the US Attorney that this deposition  
13 was going to take place, and they didn't; they  
14 waited until the eleventh hour, after you made  
15 your ruling this morning that we are allowed to  
16 ask questions about these documents, which we  
17 believe was the proper ruling. And, now, they  
18 are trying to do an end run around it by  
19 calling up the US Attorney's office in secret,  
20 and talking about it in this confidential  
21 session in secret, and keeping all this  
22 information out of the public domain.

23 So our position is that this is a  
24 topic that is the proper focus of this  
25 investigation, as the Commission has held all

1 along, and indicated in its Order, in that, we  
2 cannot proceed with our discovery, and prepare  
3 for a hearing in the case, unless we have the  
4 ability to depose witnesses, and ask them  
5 questions about the information that is in the  
6 documents, otherwise, we just have to go to a  
7 hearing and just dump a pile of documents in  
8 the Commission's offices, and not present any  
9 testimony about it, because we were not allowed  
10 to ask any witnesses questions about what were  
11 the documents that we were given. In my  
12 experience and practice --

13 ATTORNEY EXAMINER: Mr. Finnigan,  
14 if I could interject, the Commission has noted  
15 its interest to not interfere with the federal  
16 investigation, however, correct --

17 MR. FINNIGAN: Yes, Your Honor.  
18 That is correct.

19 ATTORNEY EXAMINER: -- as was noted  
20 in our earlier phone call?

21 MR. FINNIGAN: Yes. Yes. And, you  
22 know, the heart of our position, Your Honor, is  
23 that any discussion of whether this might  
24 interfere with the US Attorney's investigation,  
25 should be held in public, and let's hear what

1 the US Attorney was told about the deposition,  
2 and let's hear the US Attorney's position,  
3 because we see no reason why that discussion  
4 should be held in secret, especially, when the  
5 point of the discussion is try to reverse your  
6 ruling from earlier today that we are allowed  
7 to ask these questions.

8 MR. HOLLINGSWORTH: So a couple of  
9 things that I would like to clarify for the  
10 record. Mr. Finnigan suggested that we, you  
11 know, waited until the eleventh hour to inform  
12 the Assistant United States Attorney about  
13 these issues, which is patently false.

14 She was aware of this deposition,  
15 and she was also aware the Commission's  
16 December 2021 ruling, which to everyone who  
17 read it, believed that these issues would not  
18 be fair game for deposition, because the  
19 Commission put a stay on discovery these  
20 topics. And so when the Attorney Examiners  
21 made their ruling this afternoon, that was a  
22 significant material change in the scope of  
23 what we all believed the scope of the  
24 deposition would be, and, so, it was  
25 appropriate and consistent with our cooperation



1 obligations to inform her, at that time.

2 It clearly was not done in secret,  
3 because I immediately informed counsel for OCC  
4 of the conversation, and of the AUSA's position  
5 that questions into these topics, into these  
6 subject matters, does exactly what the  
7 Commission was worried it would do and would  
8 interfere with her ongoing investigation. You  
9 don't have to take it from me. I am  
10 representing to you that that was her position,  
11 and she is more than happy to share it with  
12 you.

13 ATTORNEY EXAMINER: But she's not  
14 available on the phone call right now.

15 MR. HOLLINGSWORTH: I'm happy to  
16 provide contact information for you to speak  
17 with her.

18 MR. FINNIGAN: And, Your Honor, one  
19 other point, the questioning that we were going  
20 to do about documents, was going to be in a  
21 confidential session of the deposition, where  
22 everybody participating has signed a  
23 confidentiality agreement with FirstEnergy  
24 Corp, that none of the information is going to  
25 be disclosed to the public, unless it is done

1 consistent with the terms of the  
2 confidentiality agreement, where FirstEnergy  
3 Corp would have full rights to object, and  
4 would receive advanced notice of any attempt by  
5 a party to make the information public, and  
6 could file either before the Commission or a  
7 court, in an attempt to block that from  
8 happening.

9 FirstEnergy Corp voluntarily  
10 entered into that confidentiality agreement,  
11 and all the parties that would be participating  
12 in the questioning, also, signed the agreement,  
13 and agreed to operate under though terms.

14 So if the information is going to  
15 be kept confidential, it doesn't seem like  
16 there is any way it could interfere with the  
17 criminal prosecution. The other thing we would  
18 note is that we are informed that there was a  
19 deposition of FirstEnergy Corp that took place  
20 on, I believe, it was May 19th and 20th, and we  
21 have the topics from that deposition. They  
22 were filed in the U.S. District Court, before  
23 the deposition took place. All the topics that  
24 were to be discussed in that deposition, as  
25 indicated in the US District Court filing, were

1 the same matters that we had intended to ask  
2 about, and that you had allowed us to ask about  
3 in the confidential session of the deposition.

4 So if the Plaintiffs in the  
5 securities litigation are allowed to take a  
6 two-day deposition of FirstEnergy Corp about  
7 these same topics, why can't OCC take a same  
8 deposition about the same topics. It would be  
9 patently unfair to customers to be prevented  
10 from obtaining the same type of information  
11 that the Plaintiffs in the federal securities  
12 litigation were allowed to get.

13 ATTORNEY EXAMINER: Thank you.  
14 Mr. Hollingsworth, do you want the last word?

15 MR. HOLLINGSWORTH: I would just  
16 say that nobody is trying to prevent the  
17 consumers from getting access to this  
18 information and to these witnesses. It's just  
19 a matter of timing, and the US Attorney's  
20 office has represented to us that the timing of  
21 these questions would materially impact their  
22 investigation.

23 And so, for the reasons set out in  
24 the December 2001 ruling by the Commission,  
25 where it says it is of utmost importance that

1 our investigations do not interfere with the  
2 criminal investigations. We would ask that you  
3 consider your ruling to be consistent with  
4 those admonishments by the Commission.

5 ATTORNEY EXAMINER: Thank you. We  
6 will go ahead and take a brief break and confer  
7 with one another and hop back on when we are  
8 ready to provide a ruling.

9 MR. HOLLINGSWORTH: And just to be  
10 clear, we are going to break, and no additional  
11 questions are going to be posed, until we  
12 resume. So there is not a need for an  
13 immediate response, particularly, if you would  
14 like to speak with the prosecutor at issue.

15 ATTORNEY EXAMINER: Thank you.

16 (Whereupon, a recess was taken.)

17 ATTORNEY EXAMINER: All right.

18 Mr. Hollingsworth, just as a follow-up to our  
19 earlier argument, what, specifically, is your  
20 position, then, on what should not be permitted  
21 to be asked in Confidential Session?

22 MR. HOLLINGSWORTH: Certainly, Your  
23 Honor. So if the question is, what should the  
24 permissible scope of deposition questions for  
25 the Corporate Separation hearing be on

1 questions related to Mr. Randazzo and  
2 Sustainability Funding Alliance, again, if the  
3 questions are narrowly tailored to the  
4 Corporate Separation topics specifically, and  
5 not underlying reasons for the payments, or for  
6 the other potential issues that could under  
7 investigation by the Department of Justice,  
8 then, we would have no problem with certain  
9 narrowly tailored questions like that.

10 It's just getting into the  
11 underlying facts about the agreements with  
12 Sustainability Funding Alliance, the nature of  
13 the payments and, the, you know, the  
14 FirstEnergy rationale for paying those  
15 payments. Those would be, I think, the topics  
16 of interest to the Department of Justice, and  
17 ones that should not be asked, at this time, on  
18 the record.

19 ATTORNEY EXAMINER: Would you  
20 agree with me, then, that questions pertaining  
21 to non-public information, related to the  
22 deferred prosecution agreement, that may  
23 interfere with the federal investigation, those  
24 should not be permitted, per your  
25 representations made from the DOJ?

1 MR. HOLLINGSWORTH: Yes,  
2 definitely. Non-public information would  
3 interfere with the investigation.

4 ATTORNEY EXAMINER: Thank you. I  
5 do believe a balance can be struck, in terms of  
6 what questions may be permitted to be asked in  
7 confidential session, certainly, we agree that  
8 any non-public information that relates to the  
9 differed prosecution agreement that may  
10 interfere with the federal investigations,  
11 should not be permitted, and we will not permit  
12 such questions to be asked.

13 It continues to be the Commission's  
14 interest, I believe, that we cited that before,  
15 to not interfere with the ongoing criminal  
16 investigation by the United States Attorney for  
17 the Southern District of Ohio, or the civil  
18 action by the Ohio Attorney General, Dave Yost,  
19 specific to Ohio's civil RICO statute. That  
20 continues to be the case today, however, I feel  
21 as if our ruling just now is not inconsistent  
22 with our prior rulings earlier today in the  
23 public transcript.

24 And further, in taking up various  
25 parties' arguments, as to whether those

1 arguments entertained by the Attorney  
2 Examiners, at the beginning of this  
3 confidential session, should be moved into the  
4 public session, we certainly agree that that  
5 does provide a level of transparency, and  
6 provides parties that may not have had access  
7 to the confidential session, a larger better  
8 picture view, as to what types of questions  
9 were actually permissible in this proceeding.

10 And so we should, we are going to  
11 be directing both, as soon as the Attorney  
12 Examiners entered the confidential, in which I  
13 believe we were at the very beginning, if not,  
14 very close to the beginning, as soon as we  
15 entered into the confidential session, as well  
16 as our ruling discussed right now should be  
17 moved into the public transcript.

18 Are there any questions?

19 MR. HOLLINGSWORTH: Not from us,  
20 Your Honor.

21 MR. DORINGO: Your Honor, I don't  
22 have any more questions on this topic. I am  
23 going to be a major downer. I do have one  
24 small issue that I want to raise, but not on  
25 this topic.

1           ATTORNEY EXAMINER: Well, let's  
2 hear if anyone has any issues with this topic,  
3 and, then, we will move on to Mr. Adoring.

4           MR. FINNIGAN: Your Honor, I just  
5 wanted to clarify whether this will constitute  
6 your ruling, as you've just described it, or  
7 will there be any written ruling that comes out  
8 and memorializes what you've just said here?

9           ATTORNEY EXAMINER: Oh, no,  
10 Mr. Finnigan. This will be all that the  
11 parties get.

12           MR. FINNIGAN: Okay. Thank you.

13           MS. WILLIS: Your Honor, if I may.  
14 As you said, you believe your ruling is  
15 consistent with this morning's ruling, does  
16 that mean this morning's ruling stands?

17           ATTORNEY EXAMINER: Absolutely. I  
18 did not provide any sort of ruling that  
19 contradicts what we stated earlier. I believe  
20 they can be -- they are both still good rulings  
21 for purposes of this deposition.

22           MS. BOJKO: Your Honor, I have a  
23 question.

24           ATTORNEY EXAMINER: Certainly.

25           MS. BOJKO: Thank you. You said



1 non-public information cannot be disclosed. We  
2 are asking questions, it's my understanding, in  
3 a confidential session. So all of the  
4 confidential session would not be considered  
5 non-public. So my understanding of your ruling  
6 is that these questions that we are asking, can  
7 be asked, and that there would be no limits on  
8 background information, or things that happened  
9 prior to House Bill 6, with regard to Corporate  
10 Separation issues and payments to entities; is  
11 that correct?

12 ATTORNEY EXAMINER: And I'm sorry,  
13 Ms. Bojko. Could you go back just maybe a  
14 step; my audio fell bad here just for a moment.

15 MS. BOJKO: Sure. My question was,  
16 you made a statement that no non-public  
17 information can be discussed or questioned.  
18 And it's my understanding that the next session  
19 we are setting forth is purely a confidential  
20 session, so nothing in the confidential session  
21 will be disclosed publically, until either a  
22 party requests that it be disclosed, or Your  
23 Honors state it will be disclosed publically,  
24 similar to our discussion here.

25 So is it fair to assume from both

1 your ruling this morning and the ruling this  
2 afternoon, that we are able to ask questions  
3 about history and back leading up to the  
4 Corporate Separation allocation questions, as  
5 well as events and items that happened  
6 Corporate Separation related before HB 6, we  
7 can ask all those questions, because none of  
8 them will be directly in the public record,  
9 when we ask them, right?

10 ATTORNEY EXAMINER: Ms. Bojko, my  
11 ruling is simply that we are not going to  
12 permit questions related to the non-public  
13 information, regarding the deferred prosecution  
14 agreement, that could potentially interfere  
15 with the federal investigations. I think that  
16 we've, Mr. Hollingsworth made it very clear,  
17 based on the representation from the DOJ that  
18 that is taking it one step too far. And while  
19 my earlier ruling stands, we will go ahead and  
20 pump the breaks, as it comes to that particular  
21 area of questioning. So anything that is not  
22 seeking that, that's where my ruling is  
23 limited.

24 MR. HOLLINGSWORTH: And thank you,  
25 Your Honor. I think that that helps to

1 clarify. But just to be clear, so, the subject  
2 of the deferred prosecution agreement relates  
3 to the payments related to House Bill 6, and,  
4 also, to Sustainability Funding Alliance.

5 ATTORNEY EXAMINER: Sir,  
6 Mr. Hollingsworth --

7 MR. HOLLINGSWORTH: Yes, Your  
8 Honor?

9 ATTORNEY EXAMINER: Can you hear  
10 me?

11 MR. HOLLINGSWORTH: Yes, I can.

12 ATTORNEY EXAMINER: Okay. I'm  
13 sorry. Could you repeat that.

14 MR. HOLLINGSWORTH: Yes. So I just  
15 wanted to be clear that when you are referring  
16 to the non-public information, related to the  
17 deferred prosecution agreement, the subject of  
18 the deferred prosecution agreement, were the  
19 payments related to HB 6 and the Sustainability  
20 Funding Alliance. So those would be the  
21 questions about anything non-public related to  
22 those topics would not be permitted; is that an  
23 accurate understanding of your ruling?

24 ATTORNEY EXAMINER: Well,  
25 Mr. Hollingsworth, I think it was a more

1 general ruling than that. But any non-public  
2 information that would -- perhaps, I need to  
3 say this clearer -- any non-public information,  
4 related to the deferred prosecution agreement,  
5 so anything that's referenced, anything that's;  
6 and, perhaps, we are trying to say the same  
7 thing.

8 MR. HOLLINGSWORTH: So any topic  
9 that is referenced in the deferred prosecution  
10 agreement.

11 MS. WILLIS: No.

12 ATTORNEY EXAMINER: I don't know if  
13 I would go that far, Mr. Hollingsworth. That  
14 would essentially nix everything in that line  
15 of questioning, and, I believe, we are trying  
16 to strike a balance here. My ruling is limited  
17 to non-public information related to the  
18 deferred prosecution agreement. I am not  
19 saying that all topics included in that  
20 deferred prosecution agreement are off the  
21 table. Does that help? Does that makes sense?

22 MR. HOLLINGSWORTH: It does. I'm  
23 just trying to make sure that, before we hop  
24 off the call, everyone is on the same page so  
25 that we don't have to bother you again. So I

1 apologize if I'm being thick and --

2 ATTORNEY EXAMINER: No. No.

3 That's fine.

4 MS. WILLIS: Your Honor, and since  
5 we are giving great weight to what the company  
6 Corp. counsel represented, with respect to  
7 Ms. Glatfelter, can we ask that Affidavits be  
8 filed by Ms. Glatfelter or the company, under  
9 oath, indicating exactly the conversation?  
10 Because if we are going to go through this in a  
11 public process, we can't really rely on a  
12 representation made with respect to a  
13 conversation had with a third party. So I  
14 would ask that consistent with --

15 ATTORNEY EXAMINER: Ms. Willis, I  
16 am making my ruling based on the arguments had  
17 during a call. I remind everyone this is a  
18 deposition transcript. And my ruling will  
19 stand. I will not be requiring or asking any  
20 additional process, as to these rulings, and, I  
21 believe, I've given my basis for providing my  
22 rulings and we will move on from there.

23 MS. BOJKO: Your Honor, Kim Bojko  
24 again. I'm sorry --

25 ATTORNEY EXAMINER: Yes.

1 MS. BOJKO: Maybe I'm being thick  
2 right now. But if you're, if you are saying we  
3 cannot ask any non-public information, then,  
4 shouldn't this part of the transcript also be  
5 made public, and that there would be no need  
6 for a confidential session? I'm just a little  
7 confused as --

8 ATTORNEY EXAMINER: Well,  
9 Ms. Bojko, it's related to the DPA, the  
10 deferred prosecution agreement. So any other  
11 confidential information, any other document of  
12 the 470,000 documents that were provided during  
13 discovery, any of those that have been marked  
14 confidential, or, otherwise, those would  
15 certainly be, you know, appropriate to raise in  
16 this confidential session.

17 So I am only referring to the  
18 non-public information, as it relates to the  
19 DPA, not any of the additional discovery  
20 documents that we indicated in one of our prior  
21 entries, that would be permissible to use  
22 during this deposition.

23 MS. BOJKO: Okay. Thank you. That  
24 helps. So then any event that happened, prior  
25 to the DPA, or not related to the DPA, are

1 still fair game.

2 ATTORNEY EXAMINER: Correct.

3 MS. BOJKO: Thank you.

4 ATTORNEY EXAMINER: Okay. And,  
5 Mr. Doringo, what is the additional issue that  
6 you had to address?

7 MR. DORINGO: Thanks, your Honors,  
8 for indulging me. OCC has a motion for  
9 extension under the procedural schedule. We  
10 have a testimony deadline for the companies on  
11 Monday, the 25th. We are trying to FirstEnergy  
12 out deposition dates for remaining witnesses.

13 So I was just wondering if we would  
14 be likely to see a ruling on that motion by say  
15 Friday or Monday, or where that stands.

16 ATTORNEY EXAMINER: I won't go into  
17 the motion in this call in great detail. We  
18 are aware of the motion. It is properly before  
19 us, and a decision is forthcoming. So I will  
20 leave it at that. But, yes, thank you for  
21 raising that.

22 MR. HOLLINGSWORTH: And Your Honor,  
23 just a procedural question. In the unlikely  
24 event that there is a dispute about where this  
25 line is, going forward, what is your preferred

1           So I agree that the entirety of the  
2       confidential session, as we did not go into any  
3       substantive questions, is permissible to be  
4       moved into the public transcript.

5           MR. FINNIGAN: Thank you, Your  
6       Honor.

7           ATTORNEY EXAMINER: Absolutely.  
8       Any additional questions? Okay. With that, I  
9       wish you all a very good evening, and, again,  
10      we will be available in the event that you need  
11      us to resolve any additional disputes.

12          MR. FINNIGAN: Thank you.

13          MR. HOLLINGSWORTH: Thank you, Your  
14      Honor.

15          ATTORNEY EXAMINER: Thank you.

16      (Deposition concluded at 6:07 p.m.)  
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1 Whereupon, counsel was requested to give  
2 instructions regarding the witness' review of  
3 the transcript pursuant to the Civil Rules.

4  
5 SIGNATURE:

6 Transcript review was requested pursuant to the  
7 applicable Rules of Civil Procedure.  
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**in**

**Case No(s). 17-0974-EL-UNC**

Summary: Application Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers' Counsel, Ohio Manufacturers' Association Energy Group, Interstate Gas Supply, Inc., and Northeast Ohio Public Energy Council electronically filed by Ms. Alana M. Noward on behalf of Willis, Maureen R.