

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION FOR CLARIFICATION OF PUCO ADMINISTRATIVE LAW JUDGE
GREGORY PRICE'S WITHDRAWAL LETTER
AND
MOTION TO TREAT JUDGE PRICE'S "WITHDRAWAL" AS A
"DISQUALIFICATION" UNDER THE OHIO CODE OF JUDICIAL CONDUCT
AND
MOTION TO VACATE RULINGS BY JUDGE PRICE THAT PREDATED HIS
WITHDRAWAL
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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August 10, 2022

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The Office of the Ohio Consumers’ Counsel (“OCC”) moves for clarification of Administrative Law Judge Gregory Price’s letter of withdrawal from the four PUCO investigations of FirstEnergy. OCC also moves that Judge Price’s “withdrawal” be treated as a “disqualification” under the Ohio Supreme Court’s Code of Judicial Conduct, Rule 2.11. Additionally, OCC moves to vacate certain rulings by Judge Price prior to his withdrawal from the PUCO investigations of FirstEnergy. And we request that the issues be reconsidered through an independent review, de novo, by a magistrate not affiliated with the PUCO.

Judge Price filed his letter of withdrawal on March 4, 2022, in this case and three other PUCO cases. It is attached. He was presiding over PUCO investigations of FirstEnergy and its scandals. (*See* attached Letter.) Most of the investigations were opened upon OCC’s motions.

Judge Price stated in his withdrawal letter that he “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.”

The PUCO should clarify whether Judge Price’s withdrawal precludes further direct and indirect involvement by him in the four cases. The PUCO’s rules and Judge Price’s withdrawal letter are not clear on whether Judge Price might continue his case involvement. For example, it is not clear that Judge Price’s involvement in a supervisory or consulting role is precluded in these cases. Judge Price is the PUCO’s Senior Attorney Examiner and Chief, Electric & Energy Section.

Further, OCC moves to vacate certain rulings of Judge Price. Prior to his withdrawal Judge Price made rulings that were to the detriment of Ohio consumers. The reasons that Judge Price stated for his withdrawal predated these rulings. OCC sets out the specific rulings in the memorandum below.

For these reasons, the PUCO should grant the OCC’s motions in the public interest, per O.A.C. 4901-1-12 and other cited authority. We are filing these motions in each of the PUCO cases for investigation of FirstEnergy. The motions are more fully explained in the attached memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

OCC represents FirstEnergy utility customers. In that representation we advocate for protection of their rights and their wallets and for a process that is fair and impartial.¹ PUCO decisions support the importance of the rule of law.² The PUCO has recognized its obligation, as a quasi-judicial body, to conduct its hearings in a manner that comports with the elements of fundamental fairness and due process.³ The Ohio Supreme Court, in recent appeals involving the PUCO and FirstEnergy Advisors, has made clear that PUCO hearings must meet the requirements of fundamental fairness.⁴

The four PUCO investigations of FirstEnergy, of which this case is a part, are impacted by the FirstEnergy scandal involving House Bill 6 that can impede the rule of

¹ At a prehearing on March 11, 2022, in Case No. 20-1502-EL-UNC, the Ohio Consumers' Counsel orally moved for clarification of Judge Price's withdrawal. Attorney-Examiner Megan Addison advised that OCC should make such a motion in writing. Tr. 60-61.

² See as one example, *In re Complaint of the City of Cincinnati v. Cincinnati Gas & Electric Company, et al.*, Case No. 91-377-EL-CSS, 1991 Ohio PUC LEXIS 798* at 10* Finding and Order (June 27, 1991).

³ *In re Complaint of the City of Cincinnati v. Cincinnati Gas & Electric Company, et al.*, Case No. 91-377-EL-CSS, 1991 Ohio PUC LEXIS 798* at 10* Finding and Order (June 27, 1991). See also: *In re Application of Suvon LLC*, 188 N.E. 3d 140, 2021-Ohio-3630.

⁴ As recently as a 2020 appeal by OCC and NOPEC, involving FirstEnergy Advisors, the Supreme Court reversed the PUCO for failing to observe a fair legal process.

law. FirstEnergy admitted a conspiracy to “defraud the public of its right to the honest services of a public official through bribery.”⁵

In this regard, we note the U.S./FirstEnergy Deferred Prosecution Agreement. There it is stated that FirstEnergy Corp. paid “\$4.3 million dollars to Public Official B [former PUCO Chair Randazzo⁶] through his consulting company in return for Public Official B performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”⁷

II. RECOMMENDATIONS

In the attached withdrawal letter by Judge Price, he states that he “provided legal review and advice to the previous Commission Chairman [Sam Randazzo] 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.”

Unfortunately, there is an ambiguity in the letter’s phrasing “I withdraw from presiding over these four proceedings.” It leaves open the possibility for Judge Price to otherwise participate directly or indirectly in these four investigation cases.

Judge Price’s letter sets out facts that are within Rule 2.11 of the Ohio Supreme Court’s Code of Judicial Conduct. Rule 2.11 states: “A judge shall disqualify himself or

⁵ *U.S. v. FirstEnergy Corp.*, Case No. 1:21-cr-86. Deferred Prosecution Agreement at 2 (July 22, 2021).

⁶ Mr. Randazzo has not been charged with any crime and denies any wrongdoing.

⁷ *Id.* at 17.

herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances....”

OCC asks the PUCO to clarify whether Judge Price is “disqualified” as under the Supreme Court’s Code of Judicial Conduct, Rule 2.11.⁸ If Judge Price continues to have involvement in the four FirstEnergy investigation cases (or any other H.B. 6-related case(s)) after his withdrawal, such as to supervise or consult, then the PUCO should disclose the involvement and end it.

In addition to seeking clarification, OCC is moving that Judge Price be disqualified as set out in Supreme Court Judicial Rule 2.11. FirstEnergy customers should have this confidence in the legal process for the ongoing cases.

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.”⁹ 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) (*See Attachment*). In O.A.C. 3745-47-20(D), the Ohio Environmental Protection Agency has adopted the Supreme Court’s Code of Judicial Conduct for its hearing officers.

Maintaining even the appearance of impartiality at a hearing is essential for public trust in our system. “This reputational interest is not a fanciful one; rather, public confidence in the judiciary is integral to preserving the justice system.” (citation omitted).

⁸ At a prehearing on March 11, 2022, in Case No. 20-1502-EL-UNC, the Ohio Consumers’ Counsel moved for clarification of Judge Price’s withdrawal. Attorney-Examiner Megan Addison advised that OCC should make such a motion in writing. Tr. 60-61.

⁹ *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.

(‘The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.’) (citation omitted) (‘[T]o perform its high function in the best way ‘justice must satisfy the appearance of justice.’”)¹⁰ (citation omitted).

OCC now addresses our motion to vacate certain rulings by Judge Price. Prior to his withdrawal Judge Price made some significant rulings in the four FirstEnergy investigation cases, that were to the detriment of FirstEnergy customers. The PUCO, for good cause, should vacate the following rulings of Judge Price:

- His Entry issued in PUCO Case 17-974-EL-UNC, dated February 10, 2022, deferring a ruling on the OCC/NOPEC request for a supplemental audit until *after* the evidentiary hearing, in the FirstEnergy-related corporate separation case;
- His Entry issued in PUCO Case 17-2474-EL-RDR, dated February 18, 2022, preventing OCC from deposing PUCO-appointed auditor Oxford Advisors and from obtaining audit-related documents, in a FirstEnergy-related distribution modernization rider case;
- His Entry issued in PUCO Case 20-1629-EL-RDR, dated December 15, 2021, staying further action, including staying parties’ discovery, on the FirstEnergy Utilities’ potential violation of OCC’s discovery rights under R.C. 4928.145 in an earlier FirstEnergy electric security plan case (Case 14-1297);
- His ruling issued during the September 14, 2021 pre-hearing conference in PUCO Case 17-974-EL-UNC, denying OCC’s discovery of the internal investigation report of FirstEnergy’s Board of Directors related to H.B. 6 matters;

¹⁰ *Wersal v. Sexton*, 674 F.3d 1010 at 31*(Ct. App. 8th Cir. 2012).

- His ruling at a January 4, 2022 pre-hearing conference in Case 17-974-EL-UNC, prohibiting multi-case-captioning for filings in the non-consolidated investigations of FirstEnergy, thus denying parties the legal benefit of filing single pleadings in multiple investigation cases on common issues.

The reasons that Judge Price gave for his withdrawal predated these rulings. The facts set out in the withdrawal letter were disqualifying of Judge Price from serving on the cases at any point. For example, in his letter, Judge Price acknowledged providing “legal review and advice to the previous Commission Chairman [Mr. Randazzo] regarding Am. Sub. H.B.6.”¹¹ House Bill 6 and its related broader FirstEnergy scandal are key issues in the PUCO’s cases for investigating FirstEnergy.

The PUCO has used its general supervisory authority over utilities to review matters decided in prior orders.¹² Where the decision-making process has been tainted, the PUCO must consider if the “decision making process was so irrevocably tainted as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency is obligated to protect.”¹³

OCC meets the standard for vacating PUCO rulings. First, we (and the consumers we represent) suffered prejudice¹⁴ from each of Judge Price’s rulings identified above.

¹¹ Letter (March 4, 2022), Case Nos. 20-1502-EL-UNC, 17-974-EL-UNC, 17-2474-EL-RDR, 20-16729-EL-RDR.

¹² *In the Matter of the Complaint of Doug Mink v. Duke Energy Ohio, Inc.*, Case No. 19-305-EL-CSS, Opinion at ¶ 12 (August 25, 2021).

¹³ *In the Matter of the Complaint of the EL-CSS, City of Cincinnati v. CG&E*, Case No. 91-377-EL-CSS, Entry at ¶ 5 (July 30, 1991).

¹⁴ See *In the Matter of Application of Ohio Edison Company*, Case No. 12-2190, Entry at ¶ 20 (December 30, 2020) citing to *Cincinnati v. Pub. Util. Comm.*, 64 Ohio St.3d 279, 281-282, 595 N.E.2d 858 (1992) and *Ohio Transp. v. Pub. Util. Comm'n*, 164 Ohio St. 98, 128 N.E.2d 22 (1955).

Second, Judge Price's rulings were not substantively valid.¹⁵ His rulings should be vacated, and the issues reconsidered with an independent review, de novo by a magistrate not affiliated with the PUCO.

The OCC motions are well made under O.A.C. 4901-1-12 and other authority.

III. CONCLUSION

For these reasons, the PUCO should grant the OCC's motions in the public interest.

Respectfully submitted,

Bruce Weston (0016973)
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/s/ William J. Michael
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¹⁵ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served on the persons stated below via electronic transmission, this 10th day of August 2022.

/s/ Maureen R. Willis

Maureen R. Willis
Senior Counsel

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

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Public Utilities Commission

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Jenifer French, Chair

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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

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**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

RULE 2.11 Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding.

(2) The judge *knows* that the judge, the judge's spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person is any of the following:

(a) A party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) Acting as a lawyer in the proceeding;

(c) Has more than a *de minimis* interest that could be substantially affected by the proceeding;

(d) Likely to be a material witness in the proceeding.

(3) The judge *knows* that he or she, individually or as a *fiduciary*, or the judge's spouse, *domestic partner*, parent, or child, or any other member of the *judge's family residing in the judge's household*, has an *economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) [RESERVED]

(5) The judge, while a judge or a *judicial candidate*, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge *knows* that the judge's spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person has acted as a judge in the proceeding.

(7) The judge meets any of the following criteria:

(a) The judge served as a lawyer in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) The judge served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the particular matter, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) The judge was a material witness concerning the matter;

(d) The judge previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and *fiduciary economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or *domestic partner* and minor children residing in the judge's household.

(C) A judge subject to disqualification under this rule, other than for personal bias or prejudice under division (A)(1) of this rule, may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Comment

[1] Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of divisions (A)(1) to (6) apply. A judge's knowledge that a lawyer, law firm, or litigant in a proceeding contributed to the judge's election campaign within the limits set forth in Rules 4.4(J) and (K), or publicly supported the judge in the campaign, does not, in and of itself, disqualify the judge.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under division (A), or the relative is known by the

judge to have an interest in the law firm that could be substantially affected by the proceeding under division (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] [RESERVED]

Comparison to Ohio Code of Judicial Conduct

Rule 2.11 is comparable to Ohio Canons 3(E) and (F) with the exception of Rule 2.11(A)(5), which has no comparable provision in the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

With two exceptions, Rule 2.11 is comparable to Model Rule 2.11. Division (A)(4), relative to the disqualification of a judge who receives a campaign contribution in excess of a specific amount, is not adopted, in part because Rule 4.4 contains what are considered reasonable contribution limits applicable to individuals and organizations, including parties, lawyers, and law firms.

Division (A)(6) is new language that addresses disqualification when a judge's spouse has previously acted as a judge in the same proceeding. This provision is comparable to Ohio Canon 3(E)(1)(d)(iii) but is not found in the Model Code.

Comment [1] is modified to remove a reference to the fact that some jurisdictions use interchangeably the terms "recusal" and "disqualification" and to indicate that the mere receipt of a campaign contribution within the permissible limits set forth in Rule 4.4 is not grounds for disqualification. Comment [6] is stricken because it merely restates the definition of "economic interest" found in the Terminology section.

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

Summary: Motion Motion for Clarification of PUCO Administrative Law Judge Gregory Price's Withdrawal Letter and Motion to Treat Judge Price's "Withdrawal" as a "Disqualification" under the Ohio Code of Judicial Conduct and Motion to Vacate Rulings by Judge Price That Predated His Withdrawal by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Michael, William J.