

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter 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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**APPLICATION FOR REHEARING  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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September 23, 2022

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The Office of the Ohio Consumers’ Counsel (“OCC”) applies for rehearing of the Public Utility Commission of Ohio’s (“PUCO”) August 24, 2022 Entry. The PUCO has four investigations, initiated largely at OCC’s request, relate to the FirstEnergy scandals. United States District Judge Algenon Marbley recently described the scandals as FirstEnergy’s “*unparalleled corruption of Ohio’s democratic process.*”<sup>1</sup>

The PUCO recently issued a complete stay of these proceedings – “in their entirety, including but not limited to, all discovery and motion practice” – in response to a request by the U.S. Attorney.<sup>2</sup> U.S. Attorney Kenneth Parker requested a stay of discovery in all four cases. He claimed that “continued discovery in the PUCO Proceedings may directly interfere with or impede the United States’ ongoing investigation.”<sup>3</sup>

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<sup>1</sup> *Emp. Retirement Sys. of City of St. Louis v. Jones*, Case No. 2:20-cv-4813, Order of Final Settlement Approval at 17 (Aug. 23, 2022) (Emphasis added).

<sup>2</sup> Entry at ¶ 87 (Aug. 24, 2022).

<sup>3</sup> Request of the United States Attorney, Southern District of Ohio, to stay all discovery in these proceedings filed by Kenneth L. Parker, United States Attorney at 2 (Aug. 16, 2022).

OCC asks the PUCO to modify on rehearing its August 24, 2022 Entry. The rehearing modification should allow certain investigatory activities – activities that will not interfere with the U.S. Attorney’s criminal investigation – to continue. The PUCO’s Entry was unreasonable and unlawful in the following respects:

Assignment of Error No. 1: The PUCO erred, violating parties’ guaranteed rights to due process and discovery by ordering, at a minimum, a blanket six-month stay of all four FirstEnergy investigations "in their entirety, including but not limited to, all discovery and motion practice." The PUCO’s ruling unreasonably exceeded the scope of the U.S. Attorney’s request for a six-month stay of discovery.

Assignment of Error No. 2: The PUCO should have allowed certain investigatory activities to continue during the six-month stay of the cases, instead of shutting down the cases entirely. The PUCO should have allowed : (1) the independent audit under way in Case No. 20-1502-EL-UNC to continue (2) a supplemental audit to be conducted in FirstEnergy’s corporate separation proceeding, as requested (on November 5, 2021) by OCC and the Northeast Ohio Public Energy Counsel (3) the granting of OCC’s motions for subpoenas filed on August 4, 2022 in Case No. 17-974-EL-UNC so that OCC can serve the subpoenas, with the depositions to be held once the stay is lifted; (4) the filing of motions relating to the scope of the PUCO’s House Bill 6 investigations; (5) discovery in Case No. 17-974-EL-UNC to be reopened after the stay is lifted; (6) for in camera review of documents produced by FirstEnergy Corp. and the FirstEnergy Utilities under protective agreements. Once a ruling has been received, if parties are successful in obtaining the documents over the assertion of privilege, the documents could be held for distribution until after the stay is lifted; and (7) parties to file motions to compel discovery and obtaining rulings. The actual production of information, if a motion to compel is successful, could occur after the stay is lifted.

Assignment of Error No. 3: The PUCO erred, when it failed to order FirstEnergy Corp. to preserve all documents and other records related to these proceedings until the stay has been lifted and the investigations have been completed, including any evidentiary hearings. Such an order would have helped to prevent prejudice to parties during the stay on discovery. The PUCO did order the preservation of records by the FirstEnergy Utilities but failed to make a corresponding order for FirstEnergy Corp. to preserve records.

OCC’s Application for Rehearing is more fully explained by the accompanying Memorandum in Support.

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On August 16, 2022, U.S. Attorney Kenneth L. Parker, who is investigating “corruption relating to Ohio House Bill 6 and action through the Public Utilities Commission of Ohio” filed a letter asking the PUCO for a six-month stay on “all discovery” in these four cases.<sup>4</sup> The PUCO then over-responded in an August 24, 2022 Entry by imposing a blanket stay of *all* activity in the case.<sup>5</sup>

The House Bill 6 scandal came to light in July 2020, when U.S. Attorney DeVillers filed criminal charges against Former House Speaker Larry Householder and others.<sup>6</sup> The July 2020 criminal complaint alleged that:

\*\*\*Householder’s Enterprise received approximately \$60 million from Company A [FirstEnergy] entities, paid through Generation Now and controlled by Householder and the Enterprise. In exchange for payments from Company A, Householder’s Enterprise helped pass House Bill 6, legislation described by an Enterprise member as a billion-dollar ‘bailout’ that saved from closure two failing nuclear power plants in Ohio affiliated with Company A.<sup>7</sup>

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<sup>4</sup> See attached Letter from U.S. Attorney Kenneth L. Parker to PUCO (Aug. 16, 2022).

<sup>5</sup> Entry at ¶ 90 (Aug. 24, 2022).

<sup>6</sup> *United States v. Larry Householder, et al.*, Case No. 1:20-cr-00077-TSB, Complaint (S.D. Ohio) (Jul. 21, 2020).

<sup>7</sup> *Id.* at 4.



Shortly afterward, OCC filed several motions asking the PUCO to investigate FirstEnergy’s activities regarding House Bill 6 and to determine, among other things, whether utility consumers had paid, through rates, for such alleged unlawful activities.<sup>8</sup> The PUCO eventually responded by opening investigations in these four cases. OCC has been pursuing discovery in these cases over the past two years.

On July 21, 2021, FirstEnergy Corp. entered into a Deferred Prosecution Agreement with the acting U.S. Attorney.<sup>9</sup> In the Deferred Prosecution Agreement, FirstEnergy Corp. admitted to the underlying facts of honest services wire fraud for planning and funding the House Bill 6 racketeering enterprise.<sup>10</sup> The U.S. Government and FirstEnergy Corp. agreed that “if this case proceeded to trial, the United States would prove the facts set forth below beyond a reasonable doubt.”<sup>11</sup>

FirstEnergy Corp. agreed and stipulated, as true and accurate that it “conspired with public officials and other individuals and entities to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy Corp.’s benefit.”<sup>12</sup> FirstEnergy Corp. admitted that it “paid millions of dollars to Public Official A [Former Ohio Speaker Larry Householder] \*\*\*in return for Public Official A

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<sup>8</sup> See, e.g., Case No. 17-974-EL-UNC, 17-2474-EL-RDR, OCC Motion for a PUCO Investigation and Management Audit of FirstEnergy, its Corporate Governance and Its Activities Regarding House Bill 6 and Motion for the PUCO to Hire an Independent Auditor for an Investigation and Management Audit of FirstEnergy and Motion for the PUCO to Reopen the Distribution Modernization Rider Audit Case and Motion for the PUCO to Require FirstEnergy to Show That It Did Not Improperly Use Money Collected from Consumers or Violate Any Regulatory Laws, Rules or Orders in Its Activities Regarding House Bill 6 (Sept. 8, 2020).

<sup>9</sup> *United States v. FirstEnergy Corp.*, Case No. 1:21-cr-00086-TSB, Deferred Prosecution Agreement (Jul. 21, 2021).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 14.

<sup>12</sup> *Id.* at 17.

pursuing nuclear legislation for FirstEnergy Corp.’s benefit in his capacity as a public official.”<sup>13</sup>

And FirstEnergy Corp. admitted that it “paid \$4.3 million dollars to Public Official B [former PUCO Chair Randazzo] 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.”<sup>14</sup>

As discussed in more detail below, the PUCO’s stay is overly broad and OCC files this Application for Rehearing to request a narrower stay that is more closely tailored to the U.S. Attorney’s request and even more limited than the U.S. Attorney’s request. In addition, OCC also seeks to expand the PUCO’s order on preservation of all records.

## II. GROUNDS FOR REHEARING

**Assignment of Error No. 1: The PUCO erred, violating parties’ guaranteed rights to due process and discovery by ordering, at a minimum, a blanket six-month stay of all four FirstEnergy investigations "in their entirety, including but not limited to, all discovery and motion practice." The PUCO’s ruling unreasonably exceeded the scope of the U.S. Attorney’s request for a six-month stay of discovery.**

The U.S. Attorney’s August 15, 2022 letter asked for a six month stay of all discovery in the PUCO’s House Bill 6 investigation cases. The PUCO responded by granting a six month stay “of these cases in their entirety, including, but not limited to, all

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<sup>13</sup> *Id.* at 17.

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

discovery and motion practice during a six-month period, except for rehearing applications and responsive memoranda related to any entries the Commission issues today, pursuant to R.C. 4903.10.”<sup>15</sup>

**A. The PUCO’s entry was unlawful because it violates parties’ guaranteed rights to due process and discovery.**

When the PUCO shut down these cases for six months (or more),<sup>16</sup> the PUCO violated parties’ rights to conduct discovery, which are guaranteed under Ohio law and rule. The PUCO also violated parties’ rights to due process guaranteed under Ohio Constitution (Section 16, Article 1) and the Fifth and Fourteenth Amendments to the U.S. Constitution. The delay imposed by the PUCO delays justice for six months or longer and potentially denying justice where relevant evidence, witnesses or testimony could go missing or no longer be available because of the delay.

R.C. 4903.082 expressly states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” In addition, Ohio Adm. Code 4901-1-16(B) provides that “any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding.” The Supreme Court has recognized that these rules should be “liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.”<sup>17</sup>

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<sup>15</sup> *Id.* at ¶ 87.

<sup>16</sup> The PUCO noted that it would allow for requests of reconsideration and/or extension of the stay, as may be appropriate.” Entry at ¶ 86. Additionally, the U.S. Attorney reserved its right to request that the stay be extended beyond the six months it requested. Letter at 2 (Aug. 15, 2022).

<sup>17</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 82-83.

In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, the Court reversed a PUCO decision denying OCC's motion to compel discovery of information regarding undisclosed side agreements relevant to whether a written stipulation was the product of serious bargaining.<sup>18</sup> The Court held that the PUCO abused its discretion in denying the relevant discovery sought by OCC.<sup>19</sup> And most recently, the Court once again acknowledged that "intervening parties in proceedings before PUCO also have a statutory right to discovery under R.C. 4903.082."<sup>20</sup>

When the PUCO shut down discovery and motion practice in these FirstEnergy investigations for at least six months, they did not just delay parties' rights to discovery. Instead, the PUCO denied parties' discovery rights by creating the substantial likelihood that relevant evidence, witnesses or testimony would be lost, missing or no longer available because of the delay. This could actually and substantially prejudice the parties who are seeking justice for Ohio consumers. And the stay of these proceedings also delays any potential refunds to consumers, refunds which could be jeopardized with the passage of time.

The PUCO also violated parties' due process rights. Article I, Section 16, of the Ohio Constitution provides that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Additionally, in the United States Constitution, the right of due process is found in both the Fifth and

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<sup>18</sup> 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 77-86.

<sup>19</sup> *Id.* at ¶ 95.

<sup>20</sup> *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, 166 Ohio St.3d 519, 2021-Ohio-3630, ¶ 41-42.

Fourteenth Amendments. The Fifth Amendment to the U.S. Constitution provides that “[n]o person shall \*\*\* be deprived of life, liberty, or property, without due process of law.” Under the Fourteenth Amendment to the U.S. Constitution, a state is prohibited from depriving “any person of life, liberty, or property, without due process of law.”

Due process of the law means that persons have, among other rights, the opportunity to be heard. That opportunity to be heard is jeopardized where delays in proceedings cause relevant evidence, witnesses or testimony to be lost, missing or no longer available because of the delay.

With the delay imposed by the PUCO, parties will have to wait to assert claims against FirstEnergy. During that wait of at least six months, witnesses and the testimony that was sought through depositions may become unavailable. And over time witnesses’ recollections become clouded. In one of the only depositions that went forward, the witness, Ms. Yeboah Amankwah, already was having trouble recollecting even the most basic of details surrounding her employment with FirstEnergy. All told Ms. Yeboah responded that she could not recall 123 times.<sup>21</sup>

The potential harm to consumers is great. Parties are substantially prejudiced by the delay. The PUCO should abrogate its order as discussed below.

**B. The PUCO’s order was also unreasonable. The PUCO’s stay order is significantly broader than the stay on “continued discovery” the U.S. Attorney requested and is broader than necessary to avoid interfering with the criminal investigation. As drafted the stay violates parties’ discovery and due process rights.**

The PUCO has unnecessarily and improperly restricted parties’ rights to obtain answers for consumers and move the cases forward while the stay is pending. As stated,

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<sup>21</sup> See generally, Deposition Transcript of Ebony Yeboah Amankwah (Jul. 21, 2022).

this violates parties' discovery and due process rights. Moreover, the PUCO's ruling was unreasonable.

Much can be accomplished without shutting the cases down completely precluding all discovery and motion practice Much can be done without interfering with the government's investigation. The PUCO should have more narrowly structured the stay, as discussed in more detail below. When the PUCO failed to issue a narrow stay, it acted unreasonably. Accordingly, OCC seeks rehearing asking the PUCO to reconsider its broad stay and allow certain investigatory activities detailed below to continue during the stay.

**Assignment of Error No. 2: The PUCO should have allowed certain investigatory activities to continue during the six-month stay of the cases, instead of shutting down the cases entirely. The PUCO should have allowed :** (1) the independent audit under way in Case No. 20-1502-EL-UNC to continue (2) a supplemental audit to be conducted in FirstEnergy's corporate separation proceeding, as requested (on November 5, 2021) by OCC and the Northeast Ohio Public Energy Counsel (3) the granting of OCC's motions for subpoenas filed on August 4, 2022 in Case No. 17-974-EL-UNC so that OCC can serve the subpoenas, with the depositions to be held once the stay is lifted; (4) the filing of motions relating to the scope of the PUCO's House Bill 6 investigations; (5) discovery in Case No. 17-974-EL-UNC to be reopened after the stay is lifted; (6) for in camera review of documents produced by FirstEnergy Corp. and the FirstEnergy Utilities under protective agreements. Once a ruling has been received, if parties are successful in obtaining the documents over the assertion of privilege, the documents could be held for distribution until after the stay is lifted; (7) parties to file motions to compel discovery and obtaining rulings. The actual production of information, if a motion to compel is successful, could occur after the stay is lifted; (8) the PUCO should have provided for the lifting of the stay in Case No. 20-1629-EL-RDR at the same time the stay for the U.S. Attorney is lifted; (9) the PUCO should have provided for publicly filing summaries of any and all communications between the PUCO and the U.S. Attorney's office both before the stay was granted and after it was granted; (10) the PUCO should have expanded the PUCO investigations to expressly include a management and performance audit examining the relationship between FirstEnergy and former PUCO chair Sam Randazzo; and (11) The PUCO should have ordered FirstEnergy to release its internal reports on the H.B. 6 scandal after the stay is lifted.

**1. The PUCO’s stay order should not apply to the independent audit under way in Case No. 20-1502-EL-UNC. The PUCO should allow the audit to continue.**

The PUCO’s stay order applies to “these cases in their entirety.”<sup>22</sup> The PUCO, however, in response to comments filed by various parties, including OCC,<sup>23</sup> finally ordered an audit in Case No. 20-1502-EL-UNC.<sup>24</sup>

The audit was “to assist the Commission with its review of the political and charitable spending of the Companies.”<sup>25</sup> According to the PUCO, the “auditor’s investigation shall determine whether the Companies’ show cause demonstration is sufficient to ensure that the cost of any political or charitable spending in support of Am. Sub. H.B.6, or the subsequent referendum effort, were not included, directly or indirectly, into any rates or charges paid by ratepayers in this state.”<sup>26</sup> The duties assigned to the auditor included a review of “costs booked to relevant Federal Energy Regulatory Commission accounts during the period from January 1, 2017 through December 31, 2019.”<sup>27</sup>

That audit report is due in December.<sup>28</sup> But, on its face, the PUCO’s stay order appears to preclude the PUCO-appointed auditor from doing his job for at least the next six months. The PUCO’s Entry, if construed this way, would be improper and unnecessary.

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<sup>22</sup> Entry at ¶ 87 (Aug. 24, 2022).

<sup>23</sup> See generally, parties’ comments and reply comments filed in Case No. 20-1502-EL-UNC on Nov. 29, 2021 and Dec. 14, 2021, respectively.

<sup>24</sup> Case No. 20-1502-EL-UNC, Entry (Mar. 9, 2022).

<sup>25</sup> *Id.*, Entry at ¶ 14.

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

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, Entry at ¶ 23 (May 4, 2022).

The PUCO's approach is overbroad. The PUCO should have fashioned a narrower order that allowed the long-awaited PUCO-ordered audit to continue. The PUCO's overly broad stay order is unreasonable.

A PUCO audit involves collecting information, including data exchanged between the auditor and the utility being audited. Under R.C. 4901.16 the PUCO-appointed auditor must not "divulge any information acquired by him in respect to the transaction property, or business of any public utility, while acting or claiming to act as such employee or agent." In other words, the auditor must keep information it acquires during the audit confidential until the final audit report is filed. The PUCO could therefore allow the audit to continue as planned without interfering with the criminal investigation.

If the PUCO does not modify the stay order as requested, this could disrupt the auditor's work. The auditor would need to adjust to a six-month (or more) hiatus where no work would be performed. It would probably be difficult for the auditor to halt work in the middle of the project and to resume work after doing nothing for a six-month period (or more).

Moreover, the auditor and FirstEnergy Utilities could have personnel turnover during this six-month period, which might make it even more difficult to complete the fact finding necessary for a thorough audit. As noted, with the passage of time, relevant evidence, witnesses or testimony may be lost, missing or no longer available. The PUCO delay imposes real risks to a fact-finding process. And inefficiencies associated with the stop and start of the audit will be created for the state and for consumers who ultimately may bear the expected high cost of the audit.



It is significant that there are other audits and investigations of FirstEnergy that are open and have not been stayed by any request of the U.S. Government. These audits include the FERC audit (Docket No. FA19-1-000) which still remains open, as well as the FERC investigation of FirstEnergy H.B. 6 activities.<sup>29</sup> FERC's audit is still open, with efforts focused on ongoing remedial steps that FirstEnergy Corp. is taking to respond to the audit report's findings.<sup>30</sup> Little is known of FERC's investigation, other than that it is ongoing, and no report has been issued. Additionally, the SEC is investigating FirstEnergy as well.<sup>31</sup> OCC is not aware that the U.S. Attorney has requested a stay of any of these audits/investigations.

Based on the foregoing, OCC requests that the PUCO modify the stay order by allowing the PUCO-appointed auditor to continue to work on the audit report during the stay period. The stay should only apply to preclude the filing of the final audit report.

- 2. The PUCO's stay order should not prevent the PUCO from granting the Motion for Supplemental Audit filed on November 5, 2021 by OCC and the Northeast Ohio Public Energy Council. The audit should be conducted during the stay as information gathering can proceed, without interfering with the government's investigation, with disclosure of information precluded under R.C. 4901.16.**

On November 5, 2021, OCC and the Northeast Ohio Public Energy Council ("NOPEC") filed a Motion for Supplemental Audit in Case No. 17-974-EL-UNC.

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<sup>29</sup> See Case No. 20-1502-EL-UNC, FirstEnergy Utilities' Supplemental Memoranda at 7 (Feb. 18, 2022), (informing the PUCO that the "Staff of FERC's Division of Investigations notified FirstEnergy Corp., in letters dated January 26 and February 22, 2021, that the Division is conducting an investigation of FirstEnergy Corp.'s lobbying and governmental affairs activities concerning HB 6.").

<sup>30</sup> *In re Audit of FirstEnergy Corp. and its Subsidiaries*, Docket No. FA19-1-000, Audit Report (Feb. 4, 2021).

<sup>31</sup> See, e.g., FirstEnergy's most recent 10Q report (at 27) discussing the SEC, through its Division of Enforcement, issuing an order directing an investigation of possible securities law violations by FE. (Jul. 26, 2022).

Attorney Examiner Price expressly deferred ruling on the motion until after the evidentiary hearing is conducted in the case.<sup>32</sup> Attorney Examiner Price upheld his “ruling,”<sup>33</sup> following an interlocutory appeal by OCC and NOPEC.<sup>34</sup>

However, in light of the sixth month stay, the PUCO should now grant OCC and NOPEC’s Motion for Supplemental Audit. The need for the Supplemental Audit continues and it can be conducted now, without interfering with the government’s investigation, given the non-disclosure restrictions the PUCO-appointed auditor is bound by.

The Motion for Supplemental Audit involved two areas. The first area concerns the numerous ex parte communications between FirstEnergy executives and then-Chair Sam Randazzo. Such communications are a violation of Ohio law, R.C. 4903.081. The second matter to be addressed in the supplemental audit is the appropriate scope of the audit. This issue involves a November 13, 2020 email from a PUCO staffer, where the staffer appears to have inappropriately limited the scope of the corporate separation audit. The staffer answered “no” to potential audit bidders inquiring if the audit would include examining the source of funds for House Bill 6 political and charitable spending or conducting tests to determine if consumers provided House Bill 6 funding.<sup>35</sup>

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<sup>32</sup> Case No. 17-974-EL-UNC, Prehearing Conference Tr. at 24 (Jan. 4, 2022).

<sup>33</sup> *Id.*, Entry (Feb. 10, 2022).

<sup>34</sup> *Id.*, Interlocutory Appel Request for Certification to the PUCO Commissioners and Application for Review by the Office of the Ohio Consumers’ Counsel and Northeast Ohio Public Energy Council (Jan. 14, 2022).

<sup>35</sup> *See*, Case 17-2474-EL-RDR, OCC Reply to PUCO Staff’s Opposition to OCC’s Subpoena for Draft Audit Reports and Other Documents Related to the Investigation of FirstEnergy, Attachment (Nov. 12, 2021).

The PUCO should grant OCC and NOPEC's motion in light of the additional delay caused by the six-month (or possibly longer) stay. In light of the stay, this case might not go to hearing until the fall of 2023. This would further delay a supplemental audit and the important litigation of the issues NOPEC and OCC raised in their request for a supplemental audit. OCC and NOPEC would be harmed by this additional delay unless these issues (ex parte and audit scope) are litigated at the same time as the underlying corporate separation case. It will be harder to locate witnesses. Witnesses' memories will not be as sharp in 2024 as they try to recall events that occurred five years earlier, in 2019. Relevant evidence, witnesses or testimony can end up lost, missing or no longer available because of the delay.

On the other hand, the U.S. Attorney's criminal investigation would not be harmed if the audit is expanded to include these two topics. Under R.C. 4901.16, the PUCO-appointed auditor is bound to conduct his work confidentially. The PUCO could allow the supplemental audit to occur now. This would provide for a speedier resolution of the issues, would protect OCC and NOPEC's due process and discovery rights, and would avoid any interference with the U.S. Attorney's criminal investigation. The PUCO's Entry should be abrogated.

**3. The PUCO should have granted the subpoenas filed on August 4, 2022 in Case No. 17-974-EL-UNC to allow OCC to obtain service, with the depositions to be conducted after the stay is lifted.**

OCC filed motions for subpoenas of nine current and former FirstEnergy Corp. executives on August 4, 2022 in Case No. 17-974-EL-UNC. The PUCO violated OCC's due process and discovery rights under R.C. 4903.082 because their stay order prohibits the PUCO from granting the OCC subpoenas.

It would not interfere with the U.S. Attorney's criminal investigation if the PUCO were to grant OCC's motions for subpoenas and allow OCC to obtain service, with the deponents being required to appear for depositions after the stay is lifted the stay order, however, would prevent OCC from conducting the depositions.

OCC has an interest in having the motions granted quickly and obtaining service of the subpoenas at this time when OCC can locate the deponents. OCC has already located the residences for these current and former FirstEnergy executives. If OCC needs to re-do this work after a six month stay (or more), the executives might move (or disappear), making it difficult or impossible for OCC to locate them and obtain service, compelling their attendance at a deposition. The PUCO should therefore modify its stay order to allow it to issue the subpoenas requiring attendance at a deposition for a date to be determined after the stay has been lifted. This would allow OCC to serve the subpoenas, thus requiring the deponents to attend the depositions and be subject to cross examination.

**4. The PUCO should have allowed parties during the stay period to file motions relating to the scope of the PUCO's House Bill 6 investigations.**

The PUCO began its House Bill 6 investigations, in response to a request by OCC, with a show cause order issued on September 15, 2020 in a new case docketed as Case No. 20-1502-EL-UNC.<sup>36</sup> The investigations (occurring in four different unconsolidated PUCO dockets) have been in progress for nearly two years and still have a long way to go. The scope of the investigations has changed over time. As more information has become available, OCC has filed various motions to change the scope of

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<sup>36</sup> Case No. 20-1502-EL-UNC, Entry (Sept. 15, 2020).

the cases. For example, OCC filed a motion for an independent audit in Case No. 20-1502-EL-UNC,<sup>37</sup> and the PUCO ordered one on March 9, 2022.<sup>38</sup>

Judge Marbley has noted that the losses caused by FirstEnergy’s “unparalleled corruption” will likely exceed hundreds of millions of dollars.<sup>39</sup> A loss of this magnitude would certainly seem to justify a management and performance audit. To date, FirstEnergy Corp. has blamed the House Bill 6 scandal on failure by its top executives to maintain “an appropriate tone of compliance.”<sup>40</sup> This explanation is wholly inadequate to explain such significant-dollar losses. A full management and performance audit, like the one requested by OCC nearly two years ago,<sup>41</sup> would be appropriate.

In addition, new information has revealed that, while the bribery scheme was in progress, FirstEnergy paid over \$100 million to the executives who were fired or “separated” for their roles in the bribery scheme.<sup>42</sup> This issue alone begs the question of how much of this executive compensation did Ohio consumers pay in the rates FirstEnergy was charging?

Filings seeking to expand the PUCO’s investigation into these matters would not interfere with the scope of the U.S. Attorney’s criminal investigation. Such filings could occur even while there is a stay on discovery. On the other hand, if the PUCO maintains this complete shut-down over the next six months, consumers will experience additional

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<sup>37</sup> Case No. 20-1502-EL-UNC, Revised Motion for an Independent Auditor (Oct. 27, 2021).

<sup>38</sup> Case No. 20-1502-EL-UNC, Entry (Mar. 9, 2022).

<sup>39</sup> *Employees Retirement System of the City of St. Louis v. Jones*, Case No. 2:20-cv-4813, Order of Final Settlement Approval at 6 (Aug. 23, 2022).

<sup>40</sup> FirstEnergy Corp. Form 10-K at 125 (Feb. 16, 2022).

<sup>41</sup> Case No. 17-974-EL-UNC, OCC Motion (Sept. 8, 2020).

<sup>42</sup> *Employees Retirement System of the City of St. Louis v. Jones*, Case No. 2:20-cv-4813, Order of Final Settlement Approval at 6 (Aug. 23, 2022).

delay in obtaining discovery and a hearing after the stay expires. The PUCO should therefore modify its stay order to allow parties to continue filing motions relating to the scope of the House Bill 6 investigations while the stay is in progress.

**5. The PUCO should have allowed discovery to be re-opened in Case No. 17-974-EL-UNC after the stay is lifted.**

The PUCO violated OCC's due process rights and OCC's rights under R.C. 4903.082 by not providing for discovery to be re-opened in Case No. 17-974-EL-UNC after the stay is lifted. The basic problem is that the PUCO set a discovery cut-off and hearing date at an early stage in Case No. 17-974-EL-UNC, then revised the hearing date several times without revising the discovery cut-off date to match the new hearing dates. This created a mismatch between the discovery cut-off date and the hearing date. This mismatch will be exacerbated by the sixth month stay because it will unfairly deprive OCC of the opportunity to do written discovery on a vast trove of information produced between the original discovery cut-off date and the ultimate hearing date.

The saga began when the PUCO issued a procedural schedule in Case No. 17-974-EL-UNC on September 17, 2021.<sup>43</sup> The PUCO's Entry established a discovery cut-off (except depositions) of November 1, 2021 and a hearing date of January 4, 2022.<sup>44</sup> The PUCO revised the procedural schedule in an October 12, 2021 Entry.<sup>45</sup> The new schedule provided for a discovery cut-off (except depositions) of November 24, 2021 and

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<sup>43</sup> Case No. 17-974-EL-UNC, Entry (Sept. 17, 2021).

<sup>44</sup> *Id.* at ¶ 18.

<sup>45</sup> Case No. 17-974-EL-UNC, Entry (Oct. 12, 2021).

a hearing date of February 10, 2022.<sup>46</sup> The PUCO rescinded the procedural schedule in a December 1, 2021 Entry but did not alter the deadline for written discovery.<sup>47</sup>

A January 4, 2022 Entry set a new hearing date of March 14, 2022 but left in place the written discovery deadline of November 24, 2021.<sup>48</sup> Another change occurred on February 10, 2022, when the PUCO extended the hearing date to May 9, 2021, but again left the written discovery deadline of November 24, 2021 in place.<sup>49</sup> The PUCO altered the procedural schedule again on April 7, 2022, setting a new hearing date of August 22, 2022 and yet again left the written discovery deadline of November 24, 2021 in place.<sup>50</sup> August 11, 2022 marked the next procedural milestone, when the PUCO established a new hearing date of January 9, 2023 but left the written discovery deadline of November 24, 2021 in place.<sup>51</sup> Although the PUCO denied OCC's interlocutory appeal of this issue,<sup>52</sup> the changed circumstances associated with the stay granted in response to the U.S. Government's request requires the PUCO to address the issue anew.

With the stay of six months (or more) it is conceivable that the hearing in Case No. 17-974-EL-UNC might not occur until the fall of 2023. If so, the written discovery deadline would have occurred approximately two years prior to the hearing date. This would deprive OCC of the opportunity for written discovery on a vast amount of information produced during this two-year interval. The PUCO should therefore modify

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<sup>46</sup> *Id.* at ¶ 24.

<sup>47</sup> *Id.*, Entry (Dec. 1, 2021).

<sup>48</sup> *Id.*, Entry (Jan. 4, 2022).

<sup>49</sup> *Id.*, Entry (Feb. 10, 2022).

<sup>50</sup> *Id.*, Entry (Apr. 7, 2022).

<sup>51</sup> *Id.*, Entry (Aug. 11, 2022).

<sup>52</sup> *Id.*, Entry (Jun. 16, 2022).

the stay order to provide that it will establish a new written discovery deadline in Case No. 17-974-EL-UNC after the stay is lifted. This would be consistent with the PUCO's claim in its Entry that "once the stay is lifted and discovery may proceed, all parties will have reasonable time for discovery and to prepare their cases before any hearing is held."<sup>53</sup>

**6. The PUCO's Order should have allowed for in camera review of documents produced by FirstEnergy Corp. and the FirstEnergy Utilities under protective agreements. Once a ruling has been received, if parties are successful in obtaining the documents over the assertion of privilege, the documents could be held for distribution until after the stay is lifted.**

From time to time, disputes have arisen under the protective agreements between FirstEnergy Corp. and OCC or the FirstEnergy Utilities and OCC. This has required the Attorney Examiners to perform an in camera review of documents to determine whether OCC is entitled to obtain copies of the documents where privilege is asserted.

The PUCO's stay order applies to "these cases in their entirety."<sup>54</sup> The PUCO violated parties' due process discovery rights under R.C. 4903.082 because the stay order prohibits the Attorney Examiners from conducting an *in camera* review of documents produced by FirstEnergy Corp. and the FirstEnergy Utilities where privilege is being asserted to deny discovery.

The PUCO should modify the stay order to allow the Attorney Examiners to continue performing any *in camera* reviews requested by parties where FirstEnergy Corp. or the FirstEnergy Utilities claim privilege as reason to withhold information. FirstEnergy

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<sup>53</sup> Entry at ¶ 87 (Aug. 24, 2022).

<sup>54</sup> *Id.*



Corp. has produced about 562,000 pages of documents<sup>55</sup> with redactions and privilege assertions being made. The Attorney Examiners could continue their *in camera* reviews without interfering with the U.S. Attorney's criminal investigation because the *in camera* reviews have been conducted outside the public forum and relate to documents already produced by FirstEnergy Corp. and the FirstEnergy Utilities in other proceedings that have not been stayed. The PUCO could issue rulings on such information and yet order the information not be distributed, if parties are successful in overcoming privilege, until after the stay is lifted.

**7. The PUCO should have allowed parties to file motions to compel discovery and obtaining rulings. The actual production of information, if a motion to compel is successful, could occur after the stay is lifted.**

FirstEnergy' Corp.'s and FirstEnergy Utilities' general lack of cooperation has required OCC to file motions to compel discovery on many occasions. Unfortunately, OCC will be required to file more motions to compel. Typically, about five months elapse from the time that OCC files a motion to compel discovery until the time when the Attorney Examiners make a ruling.

The PUCO's Entry violated parties' due process rights and parties' rights under R.C. 4903.082 because the stay order prohibits OCC from filing motions to compel discovery and obtaining rulings. It would not interfere with the U.S. Attorney's criminal investigation to allow motion practice related to motions to compel to continue so that once the stay is lifted, the documents in dispute could be provided to parties if parties prevail on the motion to compel. Revising the stay order as requested could save months

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<sup>55</sup> Case No. 17-974-EL-UNC, Joint Discovery Status Report (Aug. 26, 2022).

of needless delay after the stay order expires while the motions to compel are litigated. Such needless delay violates OCC's due process rights and OCC's rights under R.C. 4903.082 because the information sought might not be available.

The PUCO should therefore revise the stay order to allow motions to compel to continue, along with Attorney Examiner rulings, but provide for the stay to prohibit the actual production of information until the stay order expires.

**8. The PUCO should have provided for the lifting of the stay in Case No. 20-1629-EL-RDR at the same time the stay for the U.S. Attorney is lifted.**

On December 15, 2021, the PUCO issued an Entry in Case No. 20-1629-EL-RDR expanding the scope of the proceeding.<sup>56</sup> The new scope will examine whether Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company violated R.C. 4928.145 during the settlement of their *ESP IV* case.<sup>57</sup> This statute creates a duty to disclose "side agreements" the utilities enter into when settling an electric security plan case.<sup>58</sup> The PUCO noted in its December 15, 2021 Entry that FirstEnergy's Deferred Prosecution Agreement disclosed that FirstEnergy entered into a side agreement that involved Mr. Randazzo withdrawing his clients' opposition to the *ESP IV* settlement.<sup>59</sup>

The PUCO's December 15, 2021 Entry stayed all further investigation into the potential R.C. 4928.145 violation, including discovery, to avoid interfering with the U.S.

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<sup>56</sup> Case No. 20-1629-EL-RDR Entry ((Dec. 15, 2021).

<sup>57</sup> *Id.*

<sup>58</sup> *In re FirstEnergy ESP IV*, Case No. 10-388-EL-SSO Opinion and Order (Aug. 25, 2010).

<sup>59</sup> Case No. 20-1629-EL-RDR Entry at ¶ 9 (Dec. 15, 2021).

Attorney's criminal investigation.<sup>60</sup> The stay remains in effect until further PUCO order.<sup>61</sup>

The PUCO's August 24, 2022 Stay Order should have provided that the stay relating to the R.C. 4928.145 violation is automatically lifted when the August 24, 2022 Stay Order expires or is otherwise lifted. In both cases, the purpose of the stay was to avoid interfering with the U.S. Attorney's criminal investigation. There is no reason why the Stay Order in Case No. 20-1629-EL-RDR should not expire or be lifted at the same time the August 24, 2022 Stay Order is lifted.

**9. The PUCO should have provided for publicly filing summaries of any and all communications between the PUCO and the U.S. Attorney's office both before the stay was granted and after it was granted.**

The PUCO's August 24, 2022 Stay Order should have provided that the PUCO would publicly filing summaries of any and all communications between the PUCO and the U.S. Attorney's office both before the stay was granted and after it was granted.

All PUCO records are subject to disclosure under the Ohio Public Records Act<sup>62</sup> unless specifically exempted from disclosure under R.C. 149.43. The communications between the PUCO and the U.S. Attorney relating to the stay are not exempted from disclosure under R.C. 149.43. The PUCO should therefore immediately disclose such communications that have transpired to date, and any future communications which might occur.

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<sup>60</sup> *Id.* at ¶ 14.

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

<sup>62</sup> Ohio Revised Code Chapter 143.

**10. The PUCO should have expanded the PUCO investigations to expressly include a management and performance audit examining the relationship between FirstEnergy and former PUCO chair Sam Randazzo.**

The PUCO should have expanded the investigations to expressly include a full independent management and performance audit examining the relationship between FirstEnergy and former PUCO chair Sam Randazzo

The PUCO expanded the scope of the audit in Case No. 20-1629-EL-RDR to include FirstEnergy's disclosure of ten years of misallocated costs to the FirstEnergy Utilities.<sup>63</sup> The audit subsequently concluded that these "ten years of misallocated costs" include the \$4.3 million Randazzo payment.<sup>64</sup> But the auditor was unable to investigate why FirstEnergy made the payment and charged it to the utilities. The auditor stated:

Blue Ridge understands *how* costs were settled to the Ohio operating companies but not *why* FirstEnergy believed it was appropriate to record these charges to the Ohio operating companies to be possibly included in rates charged to customers. However, determining the reason is beyond the scope of Blue Ridge's analysis.<sup>65</sup>

FirstEnergy Corp.'s SEC filings provided the initial indication that the Randazzo payment "may have been for purposes other than those represented within the consulting agreement."<sup>66</sup> In the Deferred Prosecution Agreement, FirstEnergy expressly admitted the illicit nature of the \$4.3 million payment:

FirstEnergy Corp. paid the entire \$4,333,333 to Company 1 for Public Official B's benefit with the intent and for the purpose that, in return, Public Official B would perform

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<sup>63</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 (Mar. 10, 2021).

<sup>64</sup> Case No. 20-1629-EL-UNC, Audit Report Expanded Scope (Aug. 3, 2021).

<sup>65</sup> *Id.* at Expanded Scope, p. 4.

<sup>66</sup> FirstEnergy Corp., Form 8-K (Feb. 16, 2021).

official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to the passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.<sup>67</sup>

The PUCO’s expanded audit into the “ten years of misallocated costs” was quite narrow. It will only examine “whether funds collected from ratepayers were used to pay these vendors and if so, whether or not the funds associated with those payments should be returned to ratepayer....”<sup>68</sup> Under the PUCO’s approach, if FirstEnergy used ratepayer funds for the \$4.3 million Randazzo payment, then ratepayers will get their money back – end of story.

But justice demands a more probing examination, such as:

- If the Randazzo payment “may have been for purposes other than those represented within the consulting agreement” then what was the real purpose?
- What information led FirstEnergy to conclude that the real purpose was “purposes other than those represented within the consulting agreement”?
- Were any PUCO rulings affected by this undue influence?
- What communications did Mr. Randazzo and FirstEnergy have regarding FirstEnergy’s expectations for Mr. Randazzo to achieve favorable regulatory treatment for FirstEnergy?

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<sup>67</sup> *United States v. FirstEnergy Corp.*, Case No. 1:21-cr-00086-TSB, Deferred Prosecution Agreement at 35 (Jul. 21, 2021).

<sup>68</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, Request to Expand Audit Scope (Mar. 8, 2021).

- FirstEnergy disclosed that it fired its CEO Chuck Jones for violating company policies and the FirstEnergy code of conduct.<sup>69</sup> Was this in connection with the Randazzo “consulting agreement?” What led FirstEnergy to conclude this?
- FirstEnergy disclosed that it fired Eileen Mikkelsen for “her inaction regarding the amendment in 2015 of a previously disclosed purported consulting agreement.”<sup>70</sup> What did the 2015 amendment say? What should have prompted her to take action?

The Energy and Policy Institute, a utility watchdog group, found an obscure FirstEnergy loan disclosure stating that, in effect, Mr. Randazzo took actions to benefit FirstEnergy while he was PUCO Chair **in exchange for the \$4.3 million payment.** The disclosure describes a “noncompliance event” i.e., FirstEnergy broke its pledge to lenders not to commit any material violations of law while the loan was in effect. FirstEnergy described the “noncompliance event” as follows:

Payment by FE in January 2019 to an individual (the “Individual”) or the consulting firm related to such Individual of approximately \$4.3 million in connection with the termination of a purported consulting agreement (which had been in place since 2013) and **the conduct corresponding to such payment of such consulting firm and the Individual (acting at the request of for the benefit of FE as a consequence of receiving such payment) and of FE (or any of FE’s directors, officers or employees) during the time period after such**

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<sup>69</sup> FirstEnergy Corp. 8-K (Oct. 30, 2020). The firing came the same day that two defendants in the *U.S. v. Householder* criminal case pled guilty. Bischoff, L., *Two defendants in \$60 million public corruption case take plea deals*, Dayton Daily News (Oct. 29, 2020).

<sup>70</sup> FirstEnergy Corp. 8-K (May 27, 2021).

**payment during which the Individual was acting in a governmental or regulatory capacity....<sup>71</sup>**

In sum, there are many more serious issues at stake than the PUCO's narrow scope of "whether funds collected from ratepayers were used to pay these vendors and if so, whether or not the funds associated with those payments should be returned to ratepayer...."<sup>72</sup> For these reasons, the PUCO should expand the scope of its investigation to include a full management and performance audit into FirstEnergy's dealings with Mr. Randazzo related to the \$4.3 million payment.

The Pennsylvania and New Jersey Public Utilities Commissions both ordered a full management and performance audit into FirstEnergy's HB 6 activities even though FirstEnergy's illicit actions harmed consumers in those states to a much lesser degree than FirstEnergy's Ohio consumers were harmed.<sup>73</sup> The PUCO should order a full management and performance audit of FirstEnergy's relationship with Mr. Randazzo to determine the full extent of how FirstEnergy's admitted acts of honest services wire fraud, including its illicit activities involving Mr. Randazzo, harmed consumers and, importantly, how the PUCO can protect consumers to make sure such harm does not occur again.

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<sup>71</sup> Energy and Policy Institute, *FirstEnergy attributed Ohio utility regulator's actions to \$4.3 million payment* (Mar. 3, 2021) (Emphasis in original).

<sup>72</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, Request to Expand Audit Scope (Mar. 8, 2021).

<sup>73</sup> *In re FirstEnergy Pennsylvania Companies Management and Performance Audit*, Docket Nos. D-2020-3023106, D-2020-3023107, D-2020-3023108 and D-2020-3023109, Audit Report (Mar. 2022); *In re Audit of Affiliate Transactions Between Jersey Central Power and Light Company, FirstEnergy Corp. and its Affiliates*, Docket No. EA20110733, Order (May 5, 2022).

**11. The PUCO should have ordered FirstEnergy to release its internal reports on the H.B. 6 scandal after the stay is lifted**

Justice Louis Brandeis famously said: “sunlight is the best disinfectant.” He made this remark to explain the need for more transparency in government.<sup>74</sup> The PUCO could bring much needed transparency by ordering FirstEnergy to release the following documents it refers to in SEC filings:

- The internal investigation report relating to *United States v. Larry Householder*<sup>75</sup>
- The provisions of the FirstEnergy company policies and code of conduct that Mr. Jones violated<sup>76</sup>
- The consulting agreement with the firm controlled by Mr. Randazzo<sup>77</sup>
- The 2015 amendment to the consulting agreement<sup>78</sup>
- The documents that led FirstEnergy to conclude that the payment to Mr. Randazzo “may have been for purposes other than those represented within the consulting agreement”<sup>79</sup>
- The documents that led FirstEnergy to conclude that Mr. Randazzo took actions to benefit FirstEnergy while he was PUCO Chair in exchange for the \$4.3 million payment<sup>80</sup>

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<sup>74</sup> *Brandeis and the History of Transparency*, Sunlightfoundation.com (May 26, 2009).

<sup>75</sup> FirstEnergy Corp., Form 10-K at 125 (Feb. 18, 2001).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> FirstEnergy Corp. 8-K (May 27, 2021).

<sup>79</sup> FirstEnergy Corp., Form 8-K (Feb. 16, 2021).

<sup>80</sup> Energy and Policy Institute, *FirstEnergy attributed Ohio utility regulator’s actions to \$4.3 million payment* (Mar. 3, 2021) (Emphasis in original).



- The report explaining the “ten years of misallocated costs”<sup>81</sup>

The FirstEnergy Utilities may claim that they don’t have this information because it is in the possession of their affiliates, or that the PUCO has no jurisdiction to investigate these matters. These arguments are without merit. The FirstEnergy Utilities reported this information to FERC in their FERC Form 1’s filed on April 6, 2021.<sup>82</sup> Given that this information rests with the FirstEnergy Utilities (as reported on their FERC Form 1’s), the information is well within the PUCO’s jurisdiction to investigate. The FirstEnergy Utilities must grant the PUCO access to this information under R.C. 4905.15, which states:

Each public utility shall furnish to the public utilities commission, in such form and at such times as the commission requires, such accounts, reports, and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.<sup>83</sup>

The PUCO has jurisdiction over these matters under R.C. 4905.05, which authorize the PUCO to inspect the records of FirstEnergy Corp. and all its holding company affiliates that “in any way affect or relate to the costs associated with the provision of electric utility service.”<sup>84</sup> The PUCO’s jurisdiction is also authorized by R.C. 4928.18(B), which provides:

The commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility or its affiliate has

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<sup>81</sup> FirstEnergy Corp. 10-K at 28 (May 27, 2021).

<sup>82</sup> Ohio Edison, FERC Form 1 at 123.12 (Apr. 6, 2021).

<sup>83</sup> R.C. 4905.15.

<sup>84</sup> R.C. 4905.05.

violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section. For this purpose, the commission may examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations *as may relate to those businesses and investigate the interrelationship of those operations*. Any such examination or investigation by the commission shall be governed by Chapter 4903. of the Revised Code.<sup>85</sup>

In addition, the PUCO rules, promulgated to help the PUCO carry out the law, allow extensive access to the “books, accounts, and/or other pertinent records kept by an electric utility *or its affiliates* as they may relate to the businesses for which corporate separation is required.”<sup>86</sup> Further provisions in the corporate separation rules allow the PUCO Staff to “investigate such electric utility *and/or affiliate operations and the interrelationship of those operations*.”<sup>87</sup>

Nor can FirstEnergy refuse to produce these documents on the grounds that these matters are the subject of a criminal investigation or could incriminate it, as shown below:

No person shall be excused from testifying or from producing accounts, books, and papers, in any hearing before the public utilities commission any public utilities commissioner, or any person appointed by the commission to investigate any matter under its jurisdiction, on the ground or for the reason that the testimony or evidence might tend to incriminate him, or subject him to a penalty or forfeiture. No such person shall be prosecuted or subjected to any penalty or forfeiture on account of, any transaction or matter concerning which he has testified or

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<sup>85</sup> R.C. 4928.18(B) (Emphasis added).

<sup>86</sup> O.A.C. 4901:1-37-07(A) (Emphasis added).

<sup>87</sup> O.A.C. 4901:1-37-07(B) (Emphasis added).

produced any documentary evidence. No person so testifying shall be exempted from prosecution or punishment for perjury in so testifying.<sup>88</sup>

In any event, the PUCO's order should have required FirstEnergy to produce the internal investigation report when the stay is lifted. This would avoid any interference with the U.S. Attorney's criminal investigation. The internal investigation related to the FirstEnergy Utilities' utility service. Chuck Jones was not only CEO of FirstEnergy Corp. but was also the Chief Executive Officer of the FirstEnergy Utilities. The customers of FirstEnergy Utilities have a right to know the full extent of FirstEnergy's misdeeds and releasing this information would be a good first step toward identifying how FirstEnergy's misdeeds impacted customer rates.

FirstEnergy admitted that Mr. Jones was fired for code of conduct violations. If so, this violates R.C. 4928.17 and FirstEnergy's customers have a right to know how the violation occurred. The FirstEnergy Utilities admit the "ten years of misallocated costs" were wrongfully charged to customers. Customers have a right to the internal investigation report that presumably answers the questions of how and why this happened, and why it went undetected for so long. The FirstEnergy Utilities cannot reasonably argue that they do not have possession of these reports or that it is beyond the PUCO's jurisdiction to investigate these matters.

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<sup>88</sup> R.C. 4903.08.

**Assignment of Error No. 3: The PUCO erred, when it failed to order FirstEnergy Corp. to preserve all documents and other records related to these proceedings until the stay has been lifted and the investigations have been completed, including any evidentiary hearings. Such an order would have helped to prevent prejudice to parties during the stay on discovery. The PUCO did order the preservation of records by the FirstEnergy Utilities but failed to make a corresponding order for FirstEnergy Corp. to preserve records.**

As part of its stay order, the PUCO ordered the FirstEnergy Utilities to preserve all documents and other records until the stay is lifted.<sup>89</sup> This will partially help offset the prejudice that would otherwise occur for parties in the discovery process. The PUCO should expand this order to include FirstEnergy Corp. FirstEnergy Corp. has produced the bulk of the information OCC has obtained in discovery. Leaving FirstEnergy Corp. out of the equation may cause substantial prejudice for parties –prejudice that can be avoided if the preservation of records order applies to FirstEnergy Corp. The PUCO should abrogate its order.

### **III. CONCLUSION**

In order to protect consumers, the PUCO should grant rehearing on OCC's assignments of error and modify or abrogate its Order as described above.

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<sup>89</sup> Entry at ¶ 87 (Aug. 24, 2022).

Respectfully submitted,

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Ohio Consumers' Counsel

*/s/ Maureen R. Willis*

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 23<sup>rd</sup> day of September 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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August 15, 2022

By Electronic and Certified U.S. Mail

Public Utilities Commission of Ohio  
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Columbus, Ohio 43215

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Re: Case Nos. 20-1502-EL-UNC  
17-974-EL-UNC  
17-2474-EL-RDR  
20-1629-EL-RDR

Dear Commissioners,

This letter is sent pursuant to 28 U.S.C. § 517 to request that the Public Utilities Commission of Ohio ("PUCO") stay all discovery in the above-referenced proceedings (the "PUCO Proceedings").

As you are aware, the United States is conducting an ongoing investigation into corruption relating to Ohio House Bill 6 and action through the Public Utilities Commission of Ohio ("PUCO"). The United States' investigation has resulted in a Deferred Prosecution Agreement with FirstEnergy Corp. and an indictment of several individuals. Trial for two individuals charged in the indictment is scheduled to begin in January 2023.

The United States understands that substantial discovery is underway in the PUCO Proceedings, including written discovery and the potential for depositions of numerous individuals and entities. The PUCO Proceedings involve issues related to

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the United States' investigation, and the United States believes that continued discovery in the PUCO Proceedings may directly interfere with or impede the United States' ongoing investigation.<sup>1</sup> For that reason, the United States respectfully requests that PUCO stay the PUCO Proceedings for a period of six months from the date of this letter. The United States reserves its right to request that the stay be extended beyond this time.

We appreciate your prompt attention to this request. Please let us know if you have any questions.

Very truly yours,

  
KENNETH L. PARKER  
United States Attorney

cc: Emily N. Glatfelter  
Matthew C. Singer

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<sup>1</sup> PUCO has recognized the importance of not interfering with the United States' investigation. See *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-RDRR, Entry Dec. 15, 2021 at ¶ 14 (PUCO).



**This foregoing document was electronically filed with the Public Utilities  
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**9/23/2022 4:51:49 PM**

**in**

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

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