

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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.	)	

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**INTERLOCUTORY APPEAL,  
REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS  
AND  
APPLICATION FOR REVIEW  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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March 4, 2024

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On February 26, 2024, the Attorney Examiner resumed its investigations of certain past charges<sup>1</sup> to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy Utilities”) consumers which may have resulted in them paying for nefarious activities related to tainted House Bill 6 (“H.B. 6”).<sup>2</sup> While we welcome the resumption, after eighteen months of staying these and the other two H.B. 6 investigations, the Public Utilities Commission of Ohio (“PUCO”) has now gone into hyper-drive. The February 26, 2024

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<sup>1</sup> The charges to consumers that we refer to were FirstEnergy’s Delivery Capital Recovery Rider and its Distribution Modernization Rider charge.

<sup>2</sup> Entry (Feb. 26, 2024) (attached). The Entry established a procedural schedule and consolidated the two cases.

PUCO Entry established an overly aggressive procedural schedule that will deprive FirstEnergy Utilities consumers of the fair and reasonable process they are entitled to. Additionally, a more recent PUCO Entry precludes discovery from key witnesses—former PUCO Chair Samuel Randazzo, and former FirstEnergy executives Chuck Jones and Michael Dowling—a **ruling that we do not challenge**.<sup>3</sup> However, these rulings together will likely mean that much-needed answers for consumers will remain hidden from the public.

The PUCO’s February 26, 2024 Entry fails to give parties the opportunity to take advantage of and cull through the many new documents, transcripts, and evidence that have yet to be produced by FirstEnergy Corp., which was discovery in other cases involving the H.B.6 scandal. Those documents number in the hundreds of thousands (720,000) and were withheld from OCC, OMAEG, and others during the 18-month stay on discovery that the PUCO imposed. This potential evidence has yet to be produced by FirstEnergy Corp., though they acknowledge their obligation to do so as well as the breadth of documents to be produced.

And to make matters worse, the PUCO Entry does not allow for meaningful discovery from the FirstEnergy Utilities, because it closes discovery next month (April 19, 2024). Consequently, parties cannot possibly digest, let alone follow up on, the 720,000 pages of new documents or the factual evidence contained in the recent state and federal criminal indictments involving former Chair Randazzo and former FirstEnergy executives by the current deadline.

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<sup>3</sup> *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company’s Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case Nos. 17-974-EL-UNC, et al., Entry (March 1, 2024) at ¶ 7.

Per O.A.C. 4901-1-15(B), OCC and OMAEG ask that this appeal be certified to the PUCO. Upon consideration, the PUCO should reverse or modify the Attorney Examiner's February 26, 2024 ruling. That ruling deprives parties of their substantial right to ample discovery under Ohio law (R.C. 4903.082), and its due process guaranteed under the federal and state constitutions. The PUCO should issue a revised procedural schedule which eliminates the discovery cut-off date and provides for continuing the evidentiary hearing (and testimony) until *after* the state and federal criminal proceedings have concluded and all discovery is produced by FirstEnergy Corp. The PUCO should also require FirstEnergy Corp. to expeditiously produce the discovery owed to OCC, OMAEG, and other parties related to its pre-existing discovery agreement with OCC or outstanding discovery requests. This will help to facilitate adequate review of the discovery.

The reasons for granting this Interlocutory Appeal are more fully set forth in the following Request for Certification and Application for Review.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

This Interlocutory Appeal should be certified to the PUCO because the February 26, 2024 Entry presents a new or novel question of interpretation, law, or policy. The Entry also violates PUCO precedent. An immediate determination is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the PUCO ultimately reverse the ruling in question.

Upon consideration, the PUCO should reverse or modify the Attorney Examiner's February 26, 2024 ruling, which deprives parties of their substantial right to ample discovery under Ohio law (R.C. 4903.082), and their due process guaranteed under the federal and state constitutions. The PUCO should issue a revised procedural schedule which eliminates the discovery cut-off date and provides for continuing the evidentiary hearing (and testimony) until *after* the state and federal criminal proceedings have concluded and all discovery is produced by FirstEnergy Corp. The PUCO should also

require FirstEnergy Corp. to expeditiously produce the discovery owed to OCC, OMAEG, and other parties related to its pre-existing agreement or outstanding discovery requests.

Granting this Interlocutory Appeal would be consistent with Ohio law and rules for discovery and case preparation, as well as PUCO rules and precedent. It will ensure at least a modicum of due process for the parties seeking answers about whether the utility rates they were charged paid for tainted H.B. 6 activities. Granting this Interlocutory Appeal would also protect FirstEnergy Utilities' consumers and manufacturers who were, and continue to be, impacted by FirstEnergy's corrupt actions. To use the words so often quoted by the PUCO, granting this Interlocutory Appeal is necessary to "follow the facts wherever they may lead."<sup>4</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>5</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

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<sup>4</sup> PUCO News Release, *PUCO to lift stay on FirstEnergy/HB 6 investigations*, (Feb. 21, 2024), available at: <https://puco.ohio.gov/news/puco-to-lift-stay-on-firstenergy-hb6-investigations>; Entry at 2.

<sup>5</sup> O.A.C. 4901-1-15(B).



ultimately reverse the ruling in question.”<sup>6</sup> Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.<sup>7</sup>

Here, the Attorney Examiner should certify this Interlocutory Appeal because it fully satisfies this test. The appeal presents a new or novel question of law, it represents a departure from past precedent, and an immediate determination is needed to prevent undue prejudice to the parties.

### **III. REQUEST FOR CERTIFICATION**

#### **A. The Attorney Examiner’s ruling presents a new or novel question of interpretation, law, or policy.**

The February, 2024 Entry issued by the Attorney Examiner that lifts a lengthy stay where pertinent documents have been released and discovery has been accumulating, when coupled with a more recent PUCO Entry that precludes discovery from and testimony by key witnesses, presents a new or novel question of interpretation, law, or policy. Therefore, the February 26, 2024 Entry meets the standard for certification.

Three days after the Attorney Examiner issued the Entry that OCC and OMAEG now appeal, the Ohio Attorney General filed a letter requesting that the PUCO “refrain from enforcing any subpoena requiring Samuel Randazzo, Charles Jones, or Michael Dowling to produce documents or testify in any PUCO hearing while criminal proceedings are pending.”<sup>8</sup> The Ohio Attorney General alerted the PUCO that moving

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<sup>6</sup> *Id.*

<sup>7</sup> O.A.C. 4901-1-15(E).

<sup>8</sup> *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company’s Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Correspondence received from Carol Hamilton O’Brien, Deputy Attorney General for Law Enforcement (Feb. 29, 2024).

forward with discovery against the criminally indicted individuals could interfere with the state's criminal case.

OCC and OMAEG respect and have confidence in the Ohio Attorney General's assessment of Ohio law in this regard and appreciate the concern. The last thing that parties in the PUCO investigations want to do is interfere with the federal and state criminal cases that are now underway and involve the former PUCO Chair and/or former FirstEnergy executives. We agree that "avoiding interference with the ongoing federal criminal investigation by the U.S. Attorney or the civil action brought by the Ohio Attorney General Dave Yost is of the utmost importance."<sup>9</sup>

The Ohio Attorney General's letter was a game changer and certainly presents a new and novel question for the PUCO—How do you ensure parties full and complete discovery rights they are guaranteed under the constitution and law and yet shut down discovery on key witnesses? The PUCO's Entry that we are appealing today was issued before the letter from the Ohio Attorney General. That letter completely changes the whole complexion of this proceeding.

We do not intend to jeopardize the criminal cases brought by either the state or the federal government. But holding an evidentiary hearing without being allowed to conduct discovery on key witnesses is highly prejudicial to parties and virtually guarantees that FirstEnergy Utilities' consumers and manufacturers will not get the answers they deserve.

Precluding discovery of former FirstEnergy executives and former PUCO Chair is warranted and we do not oppose any PUCO rulings in that regard. But the procedural

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<sup>9</sup> *Id.*, Entry at 29 (Aug. 24, 2022).

schedule in this case should be continued until the state and federal criminal cases are concluded and all discovery is produced by FirstEnergy Corp. Otherwise, parties will be forced to move forward without the much-needed information likely to be produced through discovery of the former FirstEnergy executives and the former PUCO Chair.

Here are just a few examples highlighting where discovery is needed:

- The FirstEnergy Corp. Deferred Prosecution Agreement states that FirstEnergy Corp. paid Randazzo \$4.3 million to further nuclear bailout legislation (*i.e.*, H.B. 6) and other FirstEnergy legislative and regulatory priorities.<sup>10</sup> The auditor in the DCR charge case found “that payments were made to two entities (IEU-Ohio Administration and Sustainability Funding Alliance) that have a relationship to Sam Randazzo, the former Chair of the PUCO who recently resigned.”<sup>11</sup> The auditor found that payments to Sustainability Funding Alliance were capitalized and included in the DCR charges to consumers.<sup>12</sup> Randazzo, Jones, and Dowling were the ones who entered into and carried out the agreement for these payments; discovery from them would be needed to fully and fairly investigate the matter. Further, the PUCO expanded the scope of the DCR investigation given “that there is information in this docket and in the public domain which may demonstrate a potential violation of the Companies’ obligation to disclose a ‘side agreement’ during the ESP IV Case.”<sup>13</sup> This potential violation of R.C. 4928.145 is based on information, according to the PUCO, involving former PUCO Chair Randazzo.<sup>14</sup> Again, discovery from former Chair Randazzo and others would be needed to develop a complete record on this issue.
- Former House Speaker Larry Householder was convicted for accepting bribes from FirstEnergy Corp. to enact H.B. 6. The bribery payments were funneled through Generation Now and Hardworking Ohioans, two 501(c)(4) dark money groups. Some of the dark money payments were noted by the auditor in the DCR charge case as being charged to consumers through the DCR charge<sup>15</sup> and unsupported.<sup>16</sup> Jones and Dowling were the ones who entered into and carried out

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<sup>10</sup> *United States v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 35 (July 22, 2021).

<sup>11</sup> Expanded Scope Audit at 11.

<sup>12</sup> *Id.* at 19, Table 14.

<sup>13</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*, PUCO Case No. 20-1629-EL-RDR, Entry (Dec. 15, 2021).

<sup>14</sup> *Id.* at ¶ 9.

<sup>15</sup> *See, e.g., id.* at 9.

<sup>16</sup> *See, e.g., id.* at 13.

this agreement (along with Householder), so discovery is needed to fully and fairly investigate the matter. (Note that OCC and OMAEG would not be able to prove it through Householder's testimony because he may be unavailable.)

Regarding the DMR charge, the PUCO Commissioners (including former Chair Randazzo) inexplicably ruled that the PUCO-appointed auditor need not complete his audit (file a final report) of the nearly half billion dollars collected from FirstEnergy consumers.<sup>17</sup> We think we know why the PUCO ruled this way, dismissing the case and closing the record. Former FirstEnergy CEO Jones wrote in a text message that “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 the PUCO about does he work there or for us?”<sup>18</sup> Jones and Randazzo appear to be the ones who know about the “burning” of the DMR final report and its apparent impact on FirstEnergy's customers, so discovery is needed to fully and fairly investigate the matter.

As we stated earlier and concede, discovery of the former FirstEnergy executives and the former PUCO Chair cannot move forward, given the matters raised by the Ohio Attorney General. As a result of this game-changing information, the likes of which have not been seen before in a PUCO proceeding, the PUCO should not move forward with hearing and testimony. That would amount to ignoring highly relevant evidence that could be provided through future discovery on the former FirstEnergy executives and the former PUCO Chair.

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<sup>17</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, PUCO Case No. 17-2474-EL-RDR, Entry (Feb. 26, 2020) at 3.

<sup>18</sup> See attached text (emphasis added).

The criteria in O.A.C. 4901-1-15(B) are met because the Attorney Examiner's February 26, 2024 Entry presents a new or novel question of interpretation, law, or policy. Therefore, the appeal should be certified.

**B. The Attorney Examiner's ruling is a departure from PUCO precedent.**

This appeal should also be certified per O.A.C. 4901-1-15(B) because the Entry violates PUCO precedent in several respects.

Under the Entry, the PUCO has established a discovery cut-off of April 19, 2024.<sup>19</sup> That is unreasonable. During the eighteen months that the FirstEnergy H.B. 6 investigations were placed on hold, many significant events and revelations occurred. For example, a criminal indictment was issued by the U.S. Government against the former PUCO Chair Randazzo, and state criminal indictments were issued by the Ohio Attorney General against former PUCO Chair Randazzo and former FirstEnergy executives Jones and Dowling. Yet despite the significant amount of evidence contained in these indictments that may be germane to the DMR and DCR investigations, the PUCO has effectively denied parties the opportunity to meaningfully address it. The PUCO failed to follow its well-established precedent (law and rules) that allows parties' ample discovery rights –rights that extend to newly discovered evidence not previously known or available.<sup>20</sup>

Another way the PUCO Entry violates precedent is that the Entry maintains the same limited scope of the audits,<sup>21</sup> despite all the developments associated with the

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<sup>19</sup> Entry at 2.

<sup>20</sup> O.A.C. 4906-2-31(B).

<sup>21</sup> See, e.g., OCC's Consumer Protection Comments on the Audit Report Regarding FirstEnergy's Charges to Consumers under the Delivery Capital Recovery Rider (Oct. 4, 2021) at 13-16.

criminal federal and state indictments. This again violates PUCO precedent that the PUCO should consider all relevant evidence, including newly discovered evidence. Otherwise, the PUCO's decision may, even upon issuance, be based on out-of-date information.<sup>22</sup> The importance of expanding the scope of an audit when new information becomes available was demonstrated in the very DCR audit in the above-captioned case. The scope of the 2020 DCR audit was expanded *three times* in response to new information being released to the public.<sup>23</sup>

The Entry also is contrary to PUCO practice because, by setting a woefully short discovery schedule, parties are deprived of the right to conduct meaningful additional discovery based on changed events. OCC and OMAEG expect to receive a large volume of documents and deposition transcripts (about 720,000 pages), from the federal securities litigation arising from H.B. 6. The Attorney Examiner's Entry, however, made no meaningful accommodation to allow OCC and OMAEG time to review the new information or incorporate the information into their pre-filed testimony. Therefore, the Entry is a departure from precedent. In other cases where significant new information is presented, such as cases involving a partial settlement agreement, the PUCO typically allows meaningful time after the new information is presented for the parties to conduct discovery and address the new information in testimony.<sup>24</sup>

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<sup>22</sup> See, e.g., *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry (Feb. 10, 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, Entry (March 10, 2021), Entry (Sept. 29, 2021), Entry (Dec. 15, 2021).

<sup>24</sup> See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, Entry (May 9, 2018).

The criteria in O.A.C. 4901-1-15(B) are met because, for these reasons, the ruling a departure from past precedent. Therefore, this appeal should be certified.

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

This appeal should be certified to the PUCO because an “immediate determination” by the PUCO is needed to prevent undue prejudice<sup>25</sup> to OCC, OMAEG, Ohio consumers and manufacturers, and the public at large. OCC and OMAEG need the evidentiary hearing continued until they are free to obtain discovery directly from former Chair Randazzo, and former executives Jones and Dowling, without interfering with the criminal cases.

Apart from the issue raised by the Ohio Attorney General, OCC and OMAEG require additional time to receive and review 720,000 pages of additional documents that FirstEnergy Corp. has agreed to produce.

Undue prejudice would occur without an immediate determination of these matters. That is because even if the PUCO ultimately reverses the Attorney Examiner’s rulings after this matter has moved forward for hearing and ultimate resolution, it cannot be undone. OCC, OMAEG and other interested parties 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.*; and (2) they will not have been provided sufficient time to receive and review discovery, and prepare testimony as explained above. This amounts to a denial of due process rights, guaranteed by the federal and Ohio constitutions.

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

#### IV. APPLICATION FOR REVIEW

Regarding the DCR charge,<sup>26</sup> the PUCO-appointed auditor uncovered evidence that FirstEnergy Corp., through the FirstEnergy Utilities, passed through charges to consumers that may have been used to fund its corrupt H.B. 6 scheme. FirstEnergy Corp. did so by improperly charging the FirstEnergy Utilities' Ohio consumers through the DCR charge for "vendor payments" that were not approved for collection through the DCR charge.<sup>27</sup> Further, the PUCO expanded the scope of the DCR charge investigation on several occasions, the most recent of which was because "there is information in this docket and in the public domain which may demonstrate a potential violation of the Companies' obligation to disclose a 'side agreement' during the ESP IV Case."<sup>28</sup> This potential violation of R.C. 4928.145 is based on information, according to the PUCO, involving former PUCO Chair Randazzo.<sup>29</sup>

Regarding the DMR charge,<sup>30</sup> the auditor concluded that it could not "rule out with certainty use of Rider DMR funds to support the passage of H.B.6."<sup>31</sup> Coupled with the fact that the final DMR report was "burned," we are left with a path that should lead to answers. But that path is blocked under the Attorney Examiner's ruling.

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<sup>26</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*, PUCO Case No. 20-1629-EL-RDR.

<sup>27</sup> *Id.*, Expanded Scope Audit at 4 (Aug. 3, 2021).

<sup>28</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*, PUCO Case No. 20-1629-EL-RDR, Entry (Dec. 15, 2021).

<sup>29</sup> *Id.* at ¶ 9.

<sup>30</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, PUCO Case No. 17-2474-EL-RDR.

<sup>31</sup> *Id.*, Audit Report at 7 (Jan. 14, 2022).



The PUCO’s February 26, 2024 Entry will deprive the FirstEnergy Utilities’ consumers of the fair and reasonable process they are entitled to. When coupled with the more recent PUCO Entry that precludes discovery from key witnesses, the proposed procedural schedule will ensure that the much-needed answers to consumers will remain hidden from the public. Without discovery being conducted on the former FirstEnergy executives and former PUCO Chair, we may never know the full truth about the vendor payments that consumers paid, including the \$4.3 million payment to former PUCO Chair Randazzo. Randazzo, Jones, and Dowling were the ones who entered into and carried out the agreement for these payments, so discovery from them and testimony by them is crucial to fully and fairly investigate the matter.

Bribery payments to former Speaker Householder funneled through Generation Now and Hardworking Ohioans were noted by the auditor in the DCR charge case as being charged through the DCR charge<sup>32</sup> and unsupported.<sup>33</sup> Jones and Dowling were the ones who entered into and carried out this agreement (along with Householder), so discovery is needed to fully and fairly investigate the matter.

Regarding the DMR charge, fired FirstEnergy CEO Jones wrote in a text message that “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 the PUCO about does he work there or for us?”<sup>34</sup> Jones and Randazzo apparently were the ones who have knowledge of the agreement to “burn” the DMR final report. Therefore, discovery is needed to fully and fairly investigate the matter.

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<sup>32</sup> See, e.g., *id.* at 9.

<sup>33</sup> See, e.g., *id.* at 13.

<sup>34</sup> See attached text (emphasis added).

The PUCO's February 26, 2024 Entry fails to allow parties to review the many new documents, transcripts, and evidence produced by FirstEnergy Corp. as discovery in other cases involving the H.B.6 scandal. The PUCO Entry also fails to provide for a meaningful time period for seeking discovery from FirstEnergy Utilities. This means parties cannot even begin to digest, let alone follow up on, the 720,000 pages of new documents or the factual evidence contained in the recent state and federal criminal indictments involving former Chair Randazzo and former FirstEnergy executives.

The PUCO should issue a revised procedural schedule that extends the discovery cut-off date and provides for the evidentiary hearing to occur *after* the state and federal criminal proceedings have concluded and all discovery is produced by FirstEnergy Corp. In addition, the PUCO should require FirstEnergy Corp. to expeditiously produce the discovery owed to OCC, OMAEG, and other parties related to its pre-existing agreement to facilitate adequate review of the discovery prior to any restart of this investigation and/or outstanding discovery requests.

**A. The Entry establishing a deadline for pre-filed testimony and an evidentiary hearing date is unreasonable and unlawful because it fails to provide OCC and OMAEG adequate time for discovery.**

On September 24, 2021, in the related FirstEnergy corporate separation audit case, OCC filed a motion for subpoena to FirstEnergy Corp. requiring it to produce copies of the documents and deposition transcripts from the federal securities litigation.<sup>35</sup>

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<sup>35</sup> *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, OCC Motion for Subpoena Duces Tecum for FirstEnergy Corp. to Produce All Discovery Documents That FirstEnergy Corp. was Ordered to Provide by the U.S. Chief District Judge in a Shareholder Lawsuit (Sept. 24, 2021). The Attorney Examiner previously established that "administrative notice of evidence produced in one [H.B. 6] proceeding" will be taken in the other related H.B. 6 investigation cases. *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case Nos. 17-974-EL-UNC, et al., Entry (Aug. 24, 2022) at ¶ 82.

On or about October 8, 2021, OCC and FirstEnergy Corp. reached agreement for FirstEnergy Corp. to produce this information to OCC. To date, FirstEnergy Corp. has produced 561,173 pages of documents and one partial deposition transcript.

FirstEnergy Corp. produced these documents in 25 separate batches, over a period of ten months, as follows:

**Table 1 – FirstEnergy Corp. Document Production Dates**

<b><u>Batch No.</u></b>	<b><u>Date</u></b>
1	10/29/21
2,3	11/6/21
4,5	11/16/21
6	12/8/21
7,8	2/15/22
9,10	2/18/22
11	4/11/22
12	5/24/22
13	6/13/22
15	N/A
16-25	8/12/22

FirstEnergy Corp. stopped producing these documents and deposition transcripts to OCC when the litigation stay was ordered by the PUCO. The PUCO ruled that such production should cease, despite OCC asking for the production to continue during the stay.<sup>36</sup> FirstEnergy Corp. nevertheless kept producing documents to the plaintiffs in the federal securities litigation and apparently participated in numerous depositions. As of July 26, 2023, FirstEnergy Corp. had produced over 750,000 pages of documents to the

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<sup>36</sup> See *id.* at OCC's Application for Rehearing (Sept. 22, 2023) at Assignments of Error 1 and 2.

plaintiffs in the federal securities case and the plaintiffs had taken or noticed the depositions of 48 fact witnesses.<sup>37</sup>

In a related H.B. 6 investigation case, OCC requested an extension of the procedural schedule based on a need for additional time to review the information produced by FirstEnergy Corp. In granting OCC's request, the Attorney Examiners noted:

The attorney examiners are mindful of the substantial production of over 230,000 pages of documents by FirstEnergy Corp. in response to the broad subpoena issued by the attorney examiner at the request of OCC. The attorney examiners would have taken the document production into consideration at the prehearing conference on January 7, 2022, if OCC and NOPEC had raised an objection to the proposed date for the hearing or suggested a different hearing date.<sup>38</sup>

OCC and OMAEG are entitled to copies of the documents and deposition transcripts from the civil litigation. Also as noted above, it took FirstEnergy Corp. about eight months to produce documents to OCC before the stay. Given FirstEnergy Corp.'s slow responses to the parties' discovery requests, the procedural order in the present case should have left open the deadline for filing testimony and the evidentiary hearing date until FirstEnergy Corp. produces the requested information and until OCC and OMAEG have an adequate opportunity to review the information.

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<sup>37</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, FirstEnergy's Memorandum of Law in Opposition to Motion to Compel Discovery of FirstEnergy's "Internal Investigation" at 10 (S.D. Ohio) (July 26, 2023).

<sup>38</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. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶ 30 (Feb. 10, 2022).

The Entry’s failure to do so was unreasonable and unlawful because it deprives OCC and OMAEG of their discovery rights under Ohio law<sup>39</sup> and denies them due process guaranteed under the federal and state constitutions.<sup>40</sup> R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.”<sup>41</sup> Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules. The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases. Further, the Ohio Supreme Court has explained that “[d]ue process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a *meaningful* time and in a *meaningful* manner . . . .”<sup>42</sup> If the Entry stands, there is no meaningful opportunity to be heard on these matters.

The Entry is unreasonable and unlawful. The PUCO should therefore reverse or modify the Entry as proposed herein.

**B. The Entry is unlawful and unreasonable because it failed to extend the discovery deadline.**

The Entry is unlawful and unreasonable because it failed to set a meaningful deadline for discovery.

In the February 26, 2024 Entry, the PUCO set the deadline for the service of discovery, except for notices of deposition, for April 19, 2024.<sup>43</sup> That gives parties

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<sup>39</sup> R.C. 4903.082.

<sup>40</sup> U.S. Const., Amends. V and XIV; Ohio Const., Art. I, sec. 16.

<sup>41</sup> See *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789

<sup>42</sup> *State v. Hochhausler*, 76 Ohio St.3d 455, 459 (1996) (italics added, citations omitted).

<sup>43</sup> Entry at ¶ 4a.

approximately a month and a half to make discovery requests, receive and review the documents provided in response, and then follow up on those initial requests.

R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.”<sup>44</sup> Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules. Further, the Supreme Court of Ohio has explained that “[d]ue process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a *meaningful* time and in a *meaningful* manner . . . .”<sup>45</sup>

In light of these statutory and constitutional protections, when significant new information is presented in other cases, such as the filing of a partial settlement agreement, the PUCO typically allows meaningful time after the new information is presented to conduct discovery and address the new information in testimony.<sup>46</sup> Otherwise, parties’ discovery rights will be completely abridged, contrary to Ohio law<sup>47</sup> and due process rights guaranteed under federal and Ohio constitutions.<sup>48</sup>

Here, the Entry’s deadline for written discovery does *not* provide for ample, full and reasonable, or meaningful discovery *even though*, as described herein, significant new information has come to light.

The Entry is unreasonable and unlawful. The PUCO should therefore reverse or modify the Entry.

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<sup>44</sup> See *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789

<sup>45</sup> *State v. Hochhausler*, 76 Ohio St.3d 455, 459 (1996) (italics added, citations omitted).

<sup>46</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, Entry (May 9, 2018).

<sup>47</sup> R.C. 4903.082.

<sup>48</sup> U.S. Const., Amends. V and XIV; Ohio Const., Art. I, sec. 16.

## V. CONCLUSION

The Interlocutory Appeal should be certified to the PUCO Commissioners as it meets the standards for such an appeal under O.A.C. 4901-1-15(B). The Entry presents a new or novel question of interpretation, law, or policy. The Attorney Examiner incorrectly precluded or will preclude OCC and OMAEG's *ample* discovery rights and due process rights under the compressed procedural schedule issued by the Attorney Examiner.

The PUCO should issue a revised procedural schedule which eliminates the discovery cut-off date and provides for continuing the evidentiary hearing (and testimony) until *after* the state and federal criminal proceedings have concluded and all discovery is produced by FirstEnergy Corp. The PUCO should also require FirstEnergy Corp. to expeditiously produce the discovery owed to OCC related to its pre-existing agreement.

Respectfully submitted,

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Ohio Consumers' Counsel

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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 served on the persons stated below via electric transmission this 4<sup>th</sup> day of March 2024.

/s/ William J. Michael

William J. Michael

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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## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE  
DISTRIBUTION MODERNIZATION RIDER  
OF OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY.

CASE NO. 17-2474-EL-RDR

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

Entered in the Journal on February 26, 2024

#### I. SUMMARY

{¶ 1} In this Entry, the attorney examiner consolidates the above-captioned proceedings and sets a procedural schedule, as directed by the Commission.

#### II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined by R.C. 4928.01(A)(6), and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} The Commission issued an Entry on February 21, 2024, lifting the then-existing stay and instructing the attorney examiners to issue procedural schedules in Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, and 20-1629-EL-RDR (collectively, the *FirstEnergy Investigation Cases*). Furthermore, the Commission clarified that the decision to lift the stay includes proceedings related to an alleged violation of the

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20-1629-EL-RDR

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Companies' obligation under R.C. 4928.145 to disclose a "side agreement," which had been previously subject to a stay.

{¶ 4} Pursuant to the Commission's Entry issued in the *FirstEnergy Investigation Cases* on February 21, 2024, the attorney examiner observes that the stay has been lifted in the above-captioned proceedings and these cases may now proceed. Initially, in the furtherance of administrative efficiency, the attorney examiner finds good cause to consolidate the two above-captioned proceedings. The Supreme Court of Ohio has recognized the Commission's broad discretion to regulate its proceedings and manage its docket. *See, e.g., Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19, 734 N.E.2d 775 (2000). While Case Nos. 17-974-EL-UNC and 20-1502-EL-UNC have not been consolidated with these proceedings, the attorney examiner notes the prior instruction that "administrative notice of evidence produced in one proceeding" will be taken in the other *FirstEnergy Investigation Cases*.<sup>1</sup> *FirstEnergy Investigation Cases*, Entry (Aug. 24, 2022) at ¶82, citing *In re the Review of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC, Prehearing Conference Tr. (Jan. 4, 2022) at 23. Additionally, the attorney examiner sets the following procedural schedule:

- a. Except for notices of deposition, discovery requests, including requests regarding the potential violation of the Companies' obligation under R.C. 4928.145 to disclose a "side agreement" during Case No. 14-1297-EL-SSO, should be served no later than April 19, 2024. Further, any discovery responses should be provided within ten calendar days.
- b. Testimony on behalf of the Companies is due by May 10, 2024.

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<sup>1</sup> While this courtesy was afforded to parties to avoid duplicative discovery requests, the attorney examiner reminds parties that they will nonetheless need to demonstrate admissibility, including relevancy, of the subject information during each respective hearing. Rulings will be provided by the attorney examiner after an opportunity for parties to be heard on the matter.

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- c. Testimony on behalf of intervenors is due by May 17, 2024.
- d. A procedural/prehearing conference shall be scheduled for May 21, 2024, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio.
- e. The evidentiary hearing shall commence on June 3, 2024, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio.

{¶ 5} Additional procedural conferences will be scheduled if the attorney examiner deems them necessary.

### III. ORDER

{¶ 6} It is, therefore,

{¶ 7} ORDERED, That the above-captioned proceedings be consolidated. It is, further,

{¶ 8} ORDERED, That the procedural schedule be set in accordance with Paragraph 4. It is, further,

{¶ 9} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Jacky Werman St. John

By: Jacky Werman St. John  
Attorney Examiner

MJA/mef

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

Summary: Attorney Examiner Entry consolidating cases and setting the following procedural schedule: certain discovery requests served no later than April 19, 2024; Companies Testimony due May 10, 2024; Intervenor Testimony due May 17, 2024; Prehearing conference set for May 21, 2024, at 10:00 a.m.; and an evidentiary hearing commencing on June 3, 2024, at 10:00 a.m. electronically filed by Ms. Mary E. Fischer on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio.

**Short Message Report**

Conversations: 1	Participants: 2
Total Messages: 5	Date Range: 3/4/2020

**Outline of Conversations****NODISPLAY** 5 messages on 3/4/2020 Charles Jones Dennis Chack

**Messages in chronological order** (times are shown in GMT -05:00)**NODISPLAY****Charles Jones**

3/4/2020, 2:57 PM

He will get it done for us but cannot just jettison all process. Says the combination of over ruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us? He'll move it as fast as he can. Better come up with a short term work around.

**Dennis Chack**

3:05 PM

Ok thanks for discussing with him. How are you feeling

**Charles Jones**

3:09 PM

[REDACTED] Stopped by Sam's today on my walk. He has friends down and has been busy but he was out doing some yard work. Walking about 3 miles a day right now. A little bored since I cant golf or even get in the pool. But better than sitting in Ohio. Weather has been beautiful last 3 days.

**Dennis Chack**

3:14 PM

It was not the best the days we were there

**Charles Jones**

3:14 PM

I know. Pretty chilly and windy.

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**3/4/2024 4:40:40 PM**

**in**

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

Summary: Application Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review by Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group electronically filed by Alana M. Noward on behalf of Michael, William J..