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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of The Office of the Ohio Consumers' Counsel,	)	
Complainant,	)	Case No. 10-1128-EL-CSS
v.	)	
The Toledo Edison Company, the Ohio Edison Company, and the Cleveland Electric Illuminating Company,	)	
Respondents.	)	

MEMORANDUM CONTRA TO FIRSTENERGY'S APPLICATION FOR REVIEW FOR INTERLOCUTORY APPEAL OF ENTRY GRANTING MOTION TO COMPEL DISCOVERY RESPONSES BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Christopher J. Allwein, Counsel of Record
Jeffrey L. Small
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
allwein@occ.state.oh.us
small@occ.state.oh.us

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 4

A. The PUCO Should Uphold the AE Entry and Order FirstEnergy, as the Commission Has in the Past, to Provide Relevant Customer Information that OCC has Requested and for Which a Protective Agreement has been Executed. 4

1. Rules Cited by FirstEnergy Allow the Disclosure of Customer Information Requested by OCC, with PUCO Approval. 4

2. Recent PUCO Case Precedent Supports the Decision in the Entry. 7

3. The Confidential Information Requested is Secured by a Protective Agreement Executed Between OCC and FirstEnergy. 8

B. The Information Sought by OCC in Discovery and Compelled by the Attorney Examiner in the Entry May be Important to the OCC's Prosecution of this Case 8

1. OCC's Complaint Did Not Limit Allegations of Statutory and Administrative Code Violations to the Five Customers Who Filed Individual Complaints. 8

2. The Information OCC Seeks in Discovery is Important to Determine the Scope of the FirstEnergy's Interconnection Rule Violations and Developing Appropriate Remedies. 10

3. OCC is Conducting Discovery in Accord with Discovery Statutes and Rules. 12

C. OCC is Conferred Authority under R.C. Chapter 4911 to Represent Residential Utility Customers and under R.C. 4928.16(C)(1), Which Allows OCC to File a Complaint on Behalf of Residential Customers. 16

1. FirstEnergy's Jurisdictional Arguments are Inappropriate for a Dispute Concerning Discovery 16

2. FirstEnergy Argues for Arbitrary Limitations on OCC Authority that Do Not Exist in Ohio's Statutory Framework 17

3. R.C. Chapter 4911 Cloaks OCC with Authority to Represent Residential Utility Customers in Proceedings Before the PUCO, Whether Initiated by the OCC or Another Entity. 17

4. R.C. 4928.16(C)(1) Provides OCC Express Authority to File a Complaint on Behalf of Residential Customers.....18

5. OCC's Complaint is Not a Class Action. 21

D. FirstEnergy Must Follow the Ohio Administrative Code and Identify Company Personnel and Consultants as Requested in Interrogatories 7 and 9, and as Compelled by the AE Entry.....22

III. CONCLUSION.....25

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this memorandum contra to an *Application for Review for Interlocutory Appeal* ("Appeal") filed by the Toledo Edison Company, the Ohio Edison Company and the Cleveland Electric Illuminating Company (collectively "FirstEnergy" or "Companies").[1] FirstEnergy's Appeal seeks reversal of the Attorney Examiner's April 14, 2011 Entry (the "AE Entry") granting OCC's Motion to Compel Responses to Discovery ("Motion to Compel"). The Appeal appears intended to further delay responses to OCC's discovery that is relevant to

[1] This memorandum contra is filed pursuant to Ohio Adm. Code 4901-1-15(D).

the Complaint filed by OCC on August 12, 2010 against the Companies regarding their procedures that have caused significant interconnection delays for residential distributed generation customers and that violate Ohio law.[2]

OCC first requested the information that is the subject of the Motion to Compel nearly eight months ago.[3] The OCC respectfully requests that the Commission uphold the AE Entry and require FirstEnergy to immediately provide complete responses to OCC discovery. The information sought by the OCC should facilitate OCC's thorough and adequate preparation of its case involving residential distributed generation customers.

The interconnection violations that are the subject of the Complaint negatively affect all of FirstEnergy's residential distributed generation customers as well as potential distributed generation customers, and are contrary to state policies that encourage distributed generation.[4] Thus by extension, FirstEnergy's misfeasance and nonfeasance as part of this case has a negative impact on Ohio's renewable and distributed generation development.

FirstEnergy continues to rely upon an inaccurate and oversimplified view of OCC's Complaint in order to explain its continued delay in this proceeding and its failure to comply with the AE Entry. FirstEnergy's Appeal declares that customer information

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[2] Ohio Revised Code 4928.11(A) states: "The rules regarding interconnection shall seek to prevent barriers to new technology and shall not make compliance unduly burdensome or expensive."

[3] OCC's Motion to Compel at 1: "On August 31, 2010, OCC served discovery … upon the Companies' counsel."

[4] R.C. 4928.02(C) states that State policy is to "Ensure diversity of electricity supplies and suppliers … by *encouraging the development of distributed and small generation facilities*." Emphasis added. R.C. 4928.02(K) further states that State policy is to "*[e]ncourage implementation of distributed generation across customer classes* through regular review and updating of administrative rules governing critical issues such as, but not limited *to interconnection standards* … and *net-metering*." Emphasis added. Finally, 4928.02(F) states that it is State policy to: "Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces."

sought by the OCC is irrelevant because the information does not relate to five individual customer complaint cases in which the OCC participated or is currently participating.[5] The Company argues that "OCC does not indicate how the experience of any of these [other] customers relates to the five [individual] complainants...."[6] But the Complaint is broader in scope and not limited to the specific circumstances of five individual complaints.

The Attorney Examiner stated that OCC "contends that its requested discovery is relevant to OCC's determination of the extent to which the Companies are violating Ohio statutes and the Commission's rules."[7] The Attorney Examiner agreed with OCC that "its discovery request is reasonably calculated to lead to the discovery of admissible evidence."[8] In addition, the Entry notes the existence of a properly executed protective agreement between OCC and FirstEnergy.[9]

For the reasons set forth in this Memorandum Contra, in OCC's Motion to Compel, and in OCC's Reply to FirstEnergy's Memorandum Contra OCC's Motion to Compel ("OCC's Reply"), the PUCO should uphold the AE Entry. OCC respectfully requests that the PUCO order FirstEnergy to immediately respond to OCC Interrogatories 1, 3, 5, 7, 9 and 15 as well as to OCC Requests for the Production of Documents 5, 6, 7, and 8, as required by the Attorney Examiner.[10]

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[5] Appeal at 9 (April 19, 2011): "[T]he focal point of [OCC's] Complaint is the five individual complaints previously filed...."

[6] Appeal at 9.

[7] AE Entry at 3 (¶5) (April 14, 2011).

[8] AE Entry at 3 (¶6) (April 14, 2011).

[9] Id., at 3 (¶5).

[10] Id., at 4.

II. ARGUMENT

A. The PUCO Should Uphold the AE Entry and Order FirstEnergy, as the Commission Has in the Past, to Provide Relevant Customer Information that OCC has Requested and for Which a Protective Agreement has been Executed.

1. Rules Cited by FirstEnergy Allow the Disclosure of Customer Information Requested by OCC, with PUCO Approval.

OCC requested the names and addresses of customers with current or pending interconnection agreements. FirstEnergy's Appeal continues to object to providing customer information despite the Attorney Examiner's proper application of the PUCO's rules to direct the Companies to provide the information. FirstEnergy attempts to create a standard that does not exist under Ohio statute or Commission rules. Further, the Companies make unsubstantiated allegations about how this information may be used by OCC.

PUCO rules and recent precedent support OCC's discovery requests and the action required by the Entry. FirstEnergy cites Commission rules that require a customer's consent or a PUCO order before an electric or natural gas utility may disclose customer account numbers, social security numbers, individual customer load profiles or billing histories.[11] But the Commission rules *do not completely bar* utilities from releasing customer names and other information, and OCC seeks only residential customer names and addresses directly associated with interconnection applications.

The only applicable rule cited by FirstEnergy contains a procedure under which information may be released under the direction of the PUCO. Ohio Administrative Code 4901:1-37-04(D)(1) "prohibits electric utilities from releasing 'any proprietary

[11] Appeal at 5-6.

customer information . . . to an affiliate, or otherwise....'"[12] The primary purpose of that rule is to provide uniform corporate separation standards for electric utilities "so a competitive advantage is not gained solely because of corporate affiliation."[13] However, OCC's Complaint is directed at interconnection by customers engaged in distributed generation activities.[14]

As recognized by the AE Entry, Ohio Adm. Code 4901:1-37-04(D)(1) also states that customer information may not be released, "without the prior authorization of the customer, *except as required by regulatory agency* or court of law."[15] The PUCO is a regulatory agency that may require the release of customer information, and the Commission required the release in the Entry.[16] The customer information is relevant and necessary to further develop and support the pending Complaint. The PUCO should uphold the Entry and require the Companies to provide the requested customer information.[17]

OCC addressed the standard by which discovery disputes are governed in its Reply to FirstEnergy's Memorandum Contra OCC's Motion to Compel. Without addressing that standard, FirstEnergy claims in its Appeal that "OCC must establish at a minimum its right to the redacted customer information."[18] FirstEnergy's standard is one

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[12] Id. at 6.

[13] Ohio Adm. Code Rule 4901:1-37-02(A).

[14] OCC, as a governmental agency, is obviously not engaged in any attempt to gain a competitive advantage over the Companies as a provider of generation services.

[15] AE Entry at 3 (emphasis added). The full text of Ohio Adm. Code 4901:1-37-04(D)(1) states: "The electric utility shall not release any proprietary customer information (e.g., individual customer load profiles or billing histories) to an affiliate, or otherwise, without the prior authorization of the customer, except as required by a regulatory agency or court of law."

[16] AE Entry at 3, ¶6.

[17] See OCC's Motion to Compel at 17.

[18] Appeal at 7 (April 19, 2011).

of its own fabrication, without support under Ohio law. Case law supports that "[m]atters are exempt from discovery only if the matter is privileged or is totally irrelevant to the subject matter of the inquiry. The *burden is on the objecting party* to clearly show that the information sought is privileged or not relevant."[19] OCC is entitled to the information sought in its Motion to Compel pursuant to R.C. 4903.082 ("ample rights of discovery").

FirstEnergy also distorts OCC's intended use of the information. FirstEnergy implies that the decision in the AE Entry was not carefully considered, was improper, and is a "rubber stamp [for] OCC's request to invade the privacy of the Companies' customers."[20] OCC stated that it intends to use the customer information to "provide an accurate scope" of the Companies' interconnection and net-metering policies, and the problems those policies create for customers.[21] OCC may use the information to compare documents in FirstEnergy's customer files to the Companies' *Interconnection Report* so that the negative effects of the Companies' practices and procedures may be accurately assessed and presented to the Commission.[22]

OCC is the statutory representative of residential customers and seeks, by means of the Complaint, to improve the interconnection process for residential customers served by FirstEnergy. FirstEnergy should not be permitted to withhold information and hinder OCC's efforts to facilitate residential customer interconnection with the Companies'

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[19] *Mut. of Omaha Ins. Co. v. Garrigan* (1971), 31 Ohio Misc. 1, 60 Ohio Op. 2d 29, 285 N.E.2d 395; cited in OCC's Reply at 6 (March 21, 2001).

[20] Appeal at 7. (April 19, 2011).

[21] OCC's Reply at 8 (March 21, 2011).

[22] OCC's Motion to Compel at 14-15 (February 22, 2011).

distribution systems as provided for by statute.[23]

2. Recent PUCO Case Precedent Supports the Decision in the Entry.

Precedent exists for the PUCO to grant OCC's request. In *In re FirstEnergy 2009 MRO Proceeding*, Case No. 09-906-EL-SSO, OCC sought contracts that involved the Companies' customers.[24] The Companies argued that providing the agreements would violate corporate separations rules -- including Ohio Adm. Code 4901:1-37-04(D)(1) -- as well as the Companies' tariffs.[25] The Commission granted the OCC's Motion to Compel, stating that "this Rule [4901:1-39-04(D)] clearly provides that the Companies may disclose the information sought by OCC if required to do so by the Commission."[26]

The same arguments stated in the Appeal were repeated by FirstEnergy Solutions in Case No. 09-906-EL-SSO.[27] The Attorney Examiner resolved the discovery dispute by ordering FirstEnergy Solutions to provide the information sought by OCC in discovery.[28] OCC seeks the same order from the PUCO in this case. The Commission's rules provide an exception to the general (but not absolute) prohibition against releasing

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[23] R.C. 4928.02(F) states that it is State policy to: "Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces."

[24] *In re FirstEnergy 2009 MRO Proceeding*, Case No. 09-906-EL-SSO, OCC's Motion to Compel at 4 (November 30, 2009).

[25] *In re FirstEnergy 2009 MRO Proceeding*, Case No. 09-906-EL-SSO, FirstEnergy Memo Contra at 3-4 (December 4, 2009).

[26] Id., Entry at 2 (¶6) (December 7, 2009).

[27] Id., Tr. I at 20 (December 15, 2009).

[28] Id., Tr. I at 20-21 (argument and discussion at 16-21).

customer information. The Commission should uphold the AE Entry that order the Companies to release the information requested in OCC's discovery.

3. The Confidential Information Requested is Secured by a Protective Agreement Executed Between OCC and FirstEnergy.

OCC agrees that the customer information should be protected under an appropriate agreement. FirstEnergy and OCC executed a protective agreement on September 29, 2010.[29] The Attorney Examiner appropriately noted the executed protective agreement in the AE Entry as part of the consideration on whether to grant OCC's Motion to Compel.[30] OCC does not concede that the information is confidential, but OCC executed a protective agreement with FirstEnergy.[31] Therefore, the protection of the information requested by OCC is not an issue.

B. The Information Sought by OCC in Discovery and Compelled by the Attorney Examiner in the Entry May be Important to the OCC's Prosecution of this Case.

1. OCC's Complaint Did Not Limit Allegations of Statutory and Administrative Code Violations to the Five Customers Who Filed Individual Complaints.

OCC filed its Complaint on behalf of all of the Companies' residential customers.[32] FirstEnergy's narrow perspective of the case, that the "only violations that are at issue in this proceeding are the violations alleged with respect to the five identified complainants,"[33] misstates the nature of the Complaint and demonstrates the Companies'

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[29] See OCC's Motion to Compel, Attachment 4.

[30] AE Entry at 3 (¶5).

[31] AE Entry at 3 (¶5).

[32] Complaint at 2.

[33] Appeal at 9.

stubborn refusal to respond to OCC's discovery requests even though the Companies have now been compelled to do so. OCC did not allege in the Complaint that the Companies' statutory and rule violations are limited to five individual complainants. Rather, OCC submitted the Complaint on behalf of all FirstEnergy residential customer-generators and potential customer-generators.[34] But FirstEnergy continues to forward the mistaken – and now seemingly disingenuous – argument that the OCC Complaint (and thus any discovery) should be limited to "five customer complaints – all of which involve virtually identical facts and issues – previously filed with the Commission."[35] The Entry correctly stated that the "discovery is relevant to OCC's determination of the extent to which the Companies are violating Ohio statutes and the Commission's rules."[36]

FirstEnergy is aware that issues exist regarding the Companies' violations that extend beyond the five individual complainants that are mentioned in the Complaint. As stated in a September 16, 2010, letter from FirstEnergy to the PUCO Staff:

> [I]n recognition of the rules governing net metering under Ohio Administrative Code 4901:1-1-28 ... [FirstEnergy agrees] to notify all qualifying customers who were charged for the installation of a bi-directional meter and provide them with a refund for the same.[37]

The Companies further responded that *ten* customers were scheduled to receive refunds.[38] Thus, the Companies' discovery responses regarding specific violations, as presented in

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[34] "[FirstEnergy] engaged in and continues to engage in practices, policies, and procedures that violate Ohio Statues, Ohio Administrative Code net-metering rules, and interconnection rules by enforcing interconnection that are unduly burdensome and expensive for customer-generators." Complaint at 1. The language in the Complaint does not limit its scope to those five customers. The Companies' conduct toward the five individual customers merely provided specific examples of FirstEnergy's violations.

[35] Appeal at 8.

[36] AE Entry at 3 (¶5).

[37] OCC's Motion to Compel, Attachment 5 at 18 (response to OCC Request for Production of Documents – 4).

[38] OCC's Motion to Compel, Attachment 6 at 6 (Response to INT-15).

the OCC Complaint, show FirstEnergy's awareness that issues exist regarding its treatment of interconnections beyond the five individual complainants cited in the Complaint.

OCC's Complaint alleges violations by all of FirstEnergy's electric distribution utilities in Ohio.[39] These three utilities are linked in the Complaint by their common policies and procedures.[40] The five customers noted by FirstEnergy are located in areas served by only two of its three Ohio distribution utilities.[41] The third FirstEnergy electric distribution utility in Ohio, Cleveland Electric Illuminating, is incorporated into the Complaint via an alleged rule violation stemming from the utilities' use of FirstEnergy's net-metering application.[42] The foundation for the Companies' objections regarding the relevance of the OCC's discovery requests is incorrect: The geographic scope of the violations alleged in the Complaint is greater than that associated with the five customers cited in the Complaint.

2. The Information OCC Seeks in Discovery is Important to Determine the Scope of the FirstEnergy's Interconnection Rule Violations and Developing Appropriate Remedies.

OCC is pursuing discovery to develop the case stated in the Complaint, including an examination of the extent to which FirstEnergy is violating Ohio's statutes and the PUCO's interconnection and net-metering rules. OCC filed the Complaint in its capacity

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[39] Complaint at 14 (¶52).

[40] See e.g., Complaint, Third Claim, beginning on page 12. This claim presents FirstEnergy's *Net Energy Metering Rider – Application for Service* that includes a unilateral provision allowing FirstEnergy to terminate, at its discretion, a customer's net-metering agreement. The Application is used by all three of FirstEnergy's Ohio Companies.

[41] Complaint at 6 (¶19) which states that the five individual complainants were delayed from interconnecting with either Toledo Edison's or Ohio Edison's distribution systems.

[42] Again, see Complaint Third Claim, beginning at 12.

as the statutory representative of residential customers, including *all* FirstEnergy residential customers. OCC is authorized to represent these customers and initiate this proceeding under R.C. Chapter 4911 and R.C. 4928.16.[43] The customer information sought by OCC is relevant to reveal additional evidence, or reveal information that will lead to additional evidence, that supports OCC's allegations. The AE Entry accurately stated that "[OCC's] discovery request is reasonably calculated to lead to the discovery of admissible evidence."[44] Therefore, the Companies' Appeal should be denied by the Commission.

FirstEnergy relies upon an extremely weak objection in its effort to withhold information from OCC. The Companies state that "OCC has not established that any [customer information] - and any of the interconnection files themselves - are relevant to the five, previously filed individual consumer complaints."[45] The weakness of this objection has been pointed out by numerous legal authorities. For example:

> Matters are exempt from discovery only if the matter is privileged or is totally irrelevant to the subject matter of the inquiry. The burden is on the objecting party to clearly show that the information sought is privileged or not relevant. Mut. of Omaha Ins. Co. v. Garrigan (1971), 31 Ohio Misc. 1, 60 Ohio Op. 2d 29, 285 N.E.2d 395. The relevancy test for purposes of discovery has been given a very liberal construction.[46]

The information sought by the OCC (and compelled by the AE Entry), in this case specific customer information, is relevant. When finally provided to OCC, the information should permit OCC to present an accurate scope of the negative effect

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[43] See Part C below.

[44] AE Entry at 3 (¶5).

[45] Appeal at 8.

[46] *Insulation Unlimited, Inc. v. Two J's Properties, Ltd.* (1997), 95 Ohio Misc. 2d 18, 22, 705 N.E.2d 754, citing *Stokes v. Lorain Journal Co.* (1970), 26 Ohio Misc. 219, 55 Ohio Op. 2d 363, 266 N.E.2d 857.

FirstEnergy's interconnection and net-metering policies are having upon its residential customers. These effects extend well beyond the experiences of the five individual complainants that are mentioned in the Complaint.

The Companies base their arguments on the false premise that OCC filed a separate complaint that was limited to a few customers who have already filed complaints on their own. The experiences of five customers mentioned in the Complaint, who dealt directly with the Companies to pursue interconnection and net-metering agreements, are indicative of how FirstEnergy is handling (or more accurately, mishandling) applications the Companies receive for interconnection and net-metering.[47] Not buffered from FirstEnergy by a third-party installer, these customers witnessed first-hand the process, or lack thereof, employed by the Companies to address distributed-generation applications within their service territories. As OCC is discovering, and as stated in the Motion to Compel, the Companies' customer files reveal several other instances of apparent statutory and rule violations.[48] The discovery sought – and which the AE Entry compelled -- is relevant and will permit OCC to confirm these violations, conduct further discovery as needed, and potentially amend the Complaint and develop an appropriate remedy. The Commission should uphold the AE Entry and require FirstEnergy to immediately provide responses to OCC's discovery.

3. OCC is Conducting Discovery in Accord with Discovery Statutes and Rules.

FirstEnergy refuses to comply with reasonable and lawful discovery that is required by Ohio statute, PUCO rules, and now by the AE Entry. R.C. 4903.082 states

[47] Other customers have their systems installed by a third-party, and do not deal directly with the Companies.

[48] OCC's Motion to Compel at 10.

that "[a]ll parties and intervenors shall be granted ample rights of discovery." OCC is a party in this case, and has thus far served two sets of discovery. FirstEnergy's non-responsiveness to discovery obstructs OCC's legitimate inquiry into matters raised in the Complaint and inhibits additional discovery. OCC seeks a ruling from the Commission that enforces OCC's statutory rights, and now the AE Entry.

OCC is conducting discovery in accordance with PUCO discovery rules. Ohio Adm. Code 4901-1-16(B) states 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 subject matter of this proceeding is FirstEnergy's policies and procedures for interconnection and net-metering, and whether and to what extent the Companies are violating the governing statutes and rules. This subject matter is also the subject of OCC's discovery. OCC's discovery requests are relevant and comply with Ohio statutes and Commission rules.

OCC's lawful discovery is being obstructed by the Companies' conduct. FirstEnergy continues to allege, several times, that OCC is conducting a "fishing expedition."[49] This assertion was refuted by case law provided in OCC's Reply.[50] This allegation is without merit: it is well-established precedent under Ohio law that discovery allows parties to mine for the truth:

> Any discovery proceeding -- and it must be conceded that pretrial depositions are in many instances fishing expeditions -- has inherent in it the possibility of revealing information or data helpful to one side or another even though such information or data would be inadmissible in a subsequent trial.

[49] Appeal at 2, 8 and 12 (April 14, 2011)

[50] OCC's Reply at 8 (March 21, 2011).

> Any disadvantage to one party from another's gaining such information is offset, however, by the possible advantage therefrom of arriving at the truth of the situation, which is, and must remain, the ultimate goal in determining the rights of parties in litigation.[51]

The Attorney Examiner plainly stated that "OCC is not engaged in a fishing expedition."[52] Other than purposeful delay, it is unclear why the Companies would continue to present an argument contradicted by settled case law and the AE Entry.

The Companies continue to declare -- as though having no fundamental understanding of discovery -- that "[OCC] feels entitled to the information."[53] OCC *is* entitled, under Ohio statutes and Commission rules, to conduct discovery and receive the relevant information requested. FirstEnergy's treatment of residential distributed generation customers, initially revealed through five customer complaints, sufficiently raised OCC's concerns that the Companies' conduct with regard to all interconnection and net-metering customers (and potential customers) was contrary to State policies that encourage distributed generation. The "truth of the situation,"[54] as it has so far been revealed by FirstEnergy's incomplete discovery responses, demonstrates that OCC's concerns were justified. OCC seeks, as it is entitled to do under statute, rule, and case precedent, to continue its discovery regarding FirstEnergy's interconnection and net-metering practices.

OCC has the right to conduct discovery in order to further support and prepare its case. Ohio Adm. Code 4901-1-16(A) states: "The purpose of [the PUCO discovery

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[51] *Ex Parte Oliver* (1962), 173 Ohio St. 125, 129; 180 N.E.2d 599, 602; 18 Ohio Op. 2d 388.

[52] AE Entry at 3 (¶6).

[53] Appeal at 10.

[54] Id.

rules] is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation in commission proceedings." FirstEnergy, unwilling to respond to reasonable and lawful inquiries, likens OCC's requests to those of "an enforcement bureau for the Commission with broad, investigative and subpoena powers."[55] But a broad investigation is the cornerstone of discovery. The Ohio Supreme Court has noted that the scope of discovery is "broad."[56] The Court has also noted that "a litigant must have the ability to *investigate* and uncover evidence after filing suit."[57] OCC is conducting its investigation, which is the lawful and proper exercise of the right of any party to conduct discovery under Ohio statutes and Commission's rules. Contrary to the Companies' assertions, OCC is asking for responses to its interrogatories and for the production of documents that are relevant to the subject matter of the case within the scope of applicable discovery statutes and rules.

OCC requests that the Commission deny FirstEnergy's Appeal and allow OCC to fulfill its statutory obligations to represent residential customers. OCC has the right to conduct ample discovery in order to prepare its case under Ohio's statutes, PUCO rules, and Ohio Supreme Court precedent. The discovery OCC seeks, and which the Attorney Examiner considered and approved, is relevant and will allow OCC to support (and possibly amend) the allegations contained in the Complaint.

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[55] FirstEnergy Memo Contra to OCC's Motion to Compel at 3 (March 9, 2011).

[56] See *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, ¶83 (citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St. 3d 1479), which was cited in OCC's Motion to Compel at 4.

See also, *State ex rel. Grandview Hosp. & Medical Ctr. v. Gorman* (1990), 51 Ohio St. 3d 94, 95; 554 N.E.2d 1297, 1299, in which the court stated: "The scope of pretrial discovery is broad." Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter * * *." Civil Rule 26(B)(1);" Citing: *In re Story* (1953), 159 Ohio St. 144, 50 O.O. 116, 111 N.E. 2d 385.

[57] *Davis v. Wal-Mart Stores, Inc., D.B.A. Sam's Club, et al* (2001), 93 Ohio St.3d 488, 493; 756 N.E.2d 657, 661, concurring and dissenting opinion of Justice Sweeney (emphasis added).

C. OCC is Conferred Authority under R.C. Chapter 4911 to Represent Residential Utility Customers and under R.C. 4928.16(C)(1), Which Allows OCC to File a Complaint on Behalf of Residential Customers.

1. FirstEnergy's Jurisdictional Arguments are Inappropriate for a Dispute Concerning Discovery.

OCC's Reply stated that FirstEnergy's arguments regarding OCC's authority to bring this case are inappropriate as an objection to responding to discovery.[58] Four pages of FirstEnergy's Appeal are devoted to repeating these inappropriate arguments,[59] which are doubly inappropriate in the context of an interlocutory appeal. The scope of discovery includes "any matter, not privileged, which is relevant to the subject matter of the proceeding."[60] FirstEnergy's arguments regarding OCC's statutory authority do not address issues of privilege or relevance. And FirstEnergy's inclusion in its Appeal of arguments that are more appropriate as part of a motion to dismiss inappropriately interjects the Companies non-discovery arguments into a pleading that fails to seek the Attorney Examiner's certification.

Ohio Administrative Code 4901-1-15(A) provides for an immediate interlocutory appeal to the PUCO in four circumstances, which include circumstances where an attorney examiner "[g]rants a motion to compel discovery. . . ." But as noted, FirstEnergy's argument against the OCC's authority to bring a complaint on behalf of residential customers is essentially not an argument regarding discovery. The AE Entry

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[58] OCC's Reply at 11.

[59] Appeal at 12-15.

[60] Ohio Adm. Code 4901-1-16(B).

appropriately addresses the discovery dispute and not FirstEnergy's jurisdictional arguments. The Commission should do likewise, especially under circumstances that are inappropriate for a direct decision by the Commission without certification of a dispute by the Attorney Examiner.

2. FirstEnergy Argues for Arbitrary Limitations on OCC Authority that Do Not Exist in Ohio's Statutory Framework.

OCC has statutory authority to represent residential utility customers and to file a complaint on interconnection and net-metering rules on behalf of those customers. FirstEnergy misrepresents OCC's statutory authority, stating that "OCC cannot file a generic complaint on behalf of all residential consumers to determine whether a utility failed to provide interconnection standards not unduly burdensome and expensive."[61] But Ohio law vests OCC with the authority and the obligation to represent residential customer interests in proceedings before the Commission. Further, the Ohio Supreme Court has stated that R.C. 4928.16 may be used by OCC to file appropriate complaints regarding the residential customer class.

3. R.C. Chapter 4911 Cloaks OCC with Authority to Represent Residential Utility Customers in Proceedings Before the PUCO, Whether Initiated by the OCC or Another Entity.

The OCC's duties and obligations are presented in R.C. Chapter 4911. The statute allows the Consumers' Counsel to institute an action when necessary or appropriate:

> *Without limitation* because of enumeration, the [Consumers' Counsel] ... [m]ay take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission.[62]

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[61] Appeal at 12.

[62] R.C. 4911.02(B)(2)(b) (emphasis added).

FirstEnergy cites to R.C. 4911.02(A) in its Appeal, but omits the "without limitation" portion of the statute.[63]

As stated above, FirstEnergy's Appeal repeats the Companies' earlier arguments that question the OCC's statutory authority to bring the Complaint. These arguments would be more appropriate as part of a motion to dismiss or as part of the answer to the Complaint. The Companies' questioning of OCC's statutory authority serves only as a distraction from the discovery dispute at issue, and is inappropriate as a concern for the Commission's consideration of FirstEnergy's Appeal.

4. R.C. 4928.16(C)(1) Provides OCC Express Authority to File a Complaint on Behalf of Residential Customers.

OCC has the authority to represent residential customers in complaint cases before the Commission, but this is not the full extent of OCC's authority. OCC also has the authority to act on behalf of residential customers, whether or not individual customers have initiated a complaint. The Companies declare that "OCC does not have the right to use the complaint process to conduct a fishing expedition in the Companies' files in the *hopes* of finding more complainants."[64] This is contradictory to the plain language of Ohio law, and is yet another flawed characterization of the discovery being conducted.

First, R.C. 4928.16 provides the PUCO with jurisdiction authority to hear a complaint regarding any with regard to any statutory provisions in R.C. 4928.01 to 4928.15:

> The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person [...] to determine

[63] Appeal at 12.

[64] Id. at 12.

> whether an electric utility has violated or failed to comply with any provisions of sections 4928.01 to 4928.15....[65]

Thus the PUCO clearly has jurisdiction to hear the subject matter of OCC's Complaint.

R.C. 4928.16 also provides authority for OCC's initiation of and participation in complaints that fall under the above statutory provision. In addition to the authority conferred under R.C. Chapter 4911, Ohio law also expressly confers on OCC the ability to initiate complaints under R.C. 4928.16(C)(1):

> *In addition to* the authority conferred under section 4911.15 of the Revised Code, the consumers' counsel may file a complaint under division (A)(1) or (2) of this section on behalf of residential consumers in this state or appear before the commission as a representative of those consumers pursuant to any complaint filed under division (A)(1) or (2) of this section.[66]

The Ohio Supreme Court has noted that "Courts are 'required to apply the plain language of a statute when it is clear and unambiguous.'"[67] This statute unambiguously allows OCC to file a complaint "on behalf of residential consumers" without qualification or condition.

In addition, R.C. 4928.16 contains a second express option: That OCC may participate as a representative of customers who file a complaint.[68] Thus, OCC has the option to initiate a complaint, as noted above, or may participate in a complaint proceeding initiated by a customer, as presented in the second part of R.C. 4916(C)(1). FirstEnergy's assertion that the rule may not be used by OCC to file a complaint on behalf of customers is contrary to the plain and unambiguous language of the statute. If

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[65] R.C. 4928.16(A)(2).

[66] Emphasis added.

[67] *State v. Cook* (2010), 2010 Ohio 6305 at ¶31, citing *Jacques v. Manton*, 125 Ohio St.3d 342, 2010 Ohio 1838, 928 N.E.2d 434, ¶14, citing *State v. Lowe*, 112 Ohio St.3d 507, 2007 Ohio 606, 861 N.E.2d 512, ¶9.

[68] R.C. 4928.16(A)(1) and (2) give express jurisdiction to the PUCO under 4905.26 "upon complaint of any person...."

FirstEnergy's interpretations regarding R.C. Chapter 4911 and R.C. 4928.16 were correct, the latter statute would be unnecessary because the two options in R.C. 4928.16 would be the same. Not only would this interpretation limit OCC to one course of action, it would match the limitations that FirstEnergy alleges exist in R.C. Chapter 4911, thus making the statute duplicative.

The Ohio Supreme Court has stated that OCC may use R.C. 4928.16 on behalf of unspecified residential customers. In *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio,* the Court stated that the R.C. 4918.16 was an option for OCC to raise additional arguments:

> OCC may still raise additional issues arising from the side agreements, including its allegations of discrimination, inadequate corporate separation, and unlawful discounting of charges. Specifically, the OCC can use the complaint process set forth in R.C. 4928.16 or 4928.18, should any of the issues negatively affect its clients.[69]

The Court did not refer to any specific customers, but rather to the residential customers of the electric distribution utility in general. The above case language was presented in OCC's Reply.[70] Yet the Companies have chosen to ignore case precedent, waste the Commission's time and repeat the same argument, already refuted.

FirstEnergy's interpretation of R.C. 4928.16 is flawed and now incomplete. OCC may, according to the clear and unambiguous language of the statute, file a complaint under 4928.16(C)(1) "on behalf of residential customers." In addition to the authority conferred under R.C. Chapter 4911, OCC correctly and expressly used R.C. 4928.16 as a

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[69] *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio* (2009), Ohio St.3d 362, 2009 Ohio 604, 904 N.E.2d 853 at ¶18.

[70] OCC's Reply at 13 (March 21, 2011).

statutory basis of the Complaint.[71] The Ohio Supreme Court further clarified that the statute may be interpreted and employed by OCC in the manner in which provides a foundation for OCC's complaint. OCC has the right to receive complete answers to its discovery that investigates the Complaint that is filed by OCC under appropriate legal authority. The Commission should compel FirstEnergy to immediately provide the customer information and other information as required by the AE Entry.

5. OCC's Complaint is Not a Class Action.

OCC stated its concerns that FirstEnergy's actions may affect all Ohioans.[72] FirstEnergy attacks this legitimate concern, stated under appropriate sections of the Ohio Revised Code, by declaring that "the Commission's rules and practice do not provide for such class action complaints."[73] FirstEnergy cites to cases in which the Commission disallows class action suits[74] and concludes that "OCC cannot file a complaint case that seeks to prosecute a utility on behalf of unnamed complainants."[75] However, OCC has not declared or maintained the Complaint as a class action suit. Rather, OCC, as presented above, provided appropriate and sufficient statutory authority as the foundation for its Complaint. Thus, the class action cases cited by FirstEnergy are inapplicable and provide no basis for FirstEnergy's refusal to provide discovery responses. This argument was also refuted in OCC's Reply,[76] and the contents of OCC's Reply are conspicuously left unaddressed by FirstEnergy in its Appeal.

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[71] Complaint at 2 (¶2).

[72] OCC's Motion to Compel at 2.

[73] Appeal at 13.

[74] Id. at 13-14.

[75] Id. at 14.

[76] OCC's Reply at 14-15 (March 21, 2011).

OCC may, if necessary, provide information at hearing regarding specific FirstEnergy residential customers who have been affected by the Companies' dilatory approach to interconnection and net-metering. In order to provide complete information, OCC requests that the Commission uphold the Entry compelling FirstEnergy to provide complete responses to the OCC's discovery.

D. FirstEnergy Must Follow the Ohio Administrative Code and Identify Company Personnel and Consultants as Requested in Interrogatories 7 and 9, and as Compelled by the AE Entry.

OCC requested that the Companies follow Commission rules and precedent and identify, with specificity, the Companies' personnel and consultants who were involved in processing interconnection agreements. The Attorney Examiner agreed, "direct[ing] the Companies to thoroughly respond to OCC's discovery request for the names of employees who process/have processed requests for interconnection agreements from residential customers."[77]

FirstEnergy incorrectly states that because OCC had a chance to review the Companies' redacted records, "OCC had every opportunity to identify additional employees when it reviewed the Companies' files . . . ."[78] To support this assertion, the Companies cite Ohio Adm. Code 4901-1-19(D). FirstEnergy repeats its nebulous argument that first appeared in its Memorandum Contra OCC's Motion to Compel,[79] but

[77] AE Entry 3-4 (¶6).

[78] Appeal at 16.

[79] FirstEnergy's Memorandum Contra OCC's Motion to Compel at 16.

it remains unclear which part of the rule the Companies rely upon for their refusal to fully respond to Interrogatories 7 and 9. FirstEnergy argues that because OCC has access to the approximately 18,000 pages of documents, that "[i]f OCC wanted to compile a "complete" list of "all persons employed" by the Companies who may have "process[ed]" or "review[ed]' an interconnection file, it should have done so then.'[80] Thus, FirstEnergy incorrectly concludes that OCC should have been able to ascertain which of the many employees mentioned in those pages were responsible for processing interconnection agreements.

Ohio Adm. Code 4901-1-19(D) states that the party served must 'specify the records from which the answer may be derived or ascertained....' The specificity requirement stated by the rule is not met by simply pointing to 18,000 documents and declaring that the answer is somewhere within them. In addition to the Entry here, an attorney examiner ruling recently made this determination under circumstances where far fewer documents were involved and the level of subjectivity involved in the requested responses was far greater. In Case No. 10-176-EL-ATA, FirstEnergy argued in a motion to compel that OCC should be required to 'identify the specific documents' containing information requested by FirstEnergy in discovery.[81] The attorney examiner agreed, and required OCC to specifically identify the information requested in its discovery responses.[82]

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[80] Appeal at 16.

[81] *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Prehearing Transcript at 25 (January 7, 2011).

[82] Id. at 112.

The same, consistent result was applied to OCC's Motion to Compel in this case. The Commission should now require FirstEnergy to identify specific employees, via a document review or some other means, who were responsible for processing interconnection agreements.

Several possibly responsible employees are mentioned in various parts of the redacted documents that were provided by FirstEnergy. FirstEnergy is aware of individual employees' responsibilities. Those responsible for reviewing interconnection complaints are likely a small number of the many employees mentioned in the 18,000 documents. As noted previously by the Companies, OCC pointed out a specific employee who signed several of the agreements, and that person was not named by FirstEnergy in response to interrogatory 7 or 9.[83] Even with the name provided, FirstEnergy would not confirm or deny that the identified employee was responsible for any part of the interconnection process.[84] FirstEnergy's evasive behavior was not condoned by the attorney examiner in this proceeding. The Commission should reject FirstEnergy's further argument of the matter in the Appeal.

FirstEnergy has a responsibility, as the party being served with discovery, to amend a deficient response. Ohio Adm. Code 4901-1-16(D)(2) states that a response must be supplemented when 'the responding party later learned that the response was incorrect or otherwise materially deficient.' Once FirstEnergy was made aware, through OCC's inquiry, that its response was deficient, the Companies were required, as stated in the rule, to amend the response with complete information. The Attorney Examiner

[83] FirstEnergy Memo Contra at 16.

[84] OCC's Motion to Compel, Attachment 13.

required a complete response in the AE Entry.[85] The Commission should uphold the AE Entry and order FirstEnergy to provide complete responses to OCC's discovery.

III. CONCLUSION

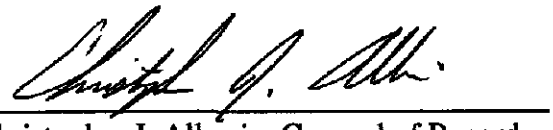
The information requested by OCC is relevant to disputed matters, and FirstEnergy makes no claim of privilege in its refusal to respond to discovery. In response to OCC's Motion to Compel, FirstEnergy cobbled together a series of inapplicable rules and unrelated case law in an effort to delay its compliance with discovery statutes, rules, and the AE Entry. The Companies' Appeal repeats arguments from FirstEnergy's Memorandum Contra OCC's Motion to Compel that were soundly addressed in OCC's Reply and in the AE Entry. The Commission should also reject FirstEnergy's arguments and order the Companies' immediate compliance with the AE Entry.

FirstEnergy has the burden to show that OCC's discovery is inappropriate. It has not met that burden. The Appeal appears designed to delay compliance with the OCC's legitimate discovery activities under Ohio law. OCC respectfully requests that the Commission uphold the Attorney Examiner's ruling and order the Companies to provide customer information to OCC, and that FirstEnergy respond with particularity to OCC interrogatories.

[85] AE Entry at 3-4(¶6).

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

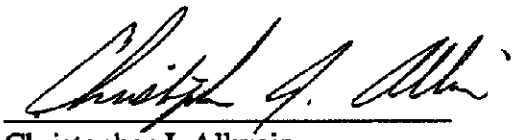


Christopher J. Allwein, Counsel of Record
Jeffrey L. Small
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
allwein@occ.state.oh.us
small@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memorandum Contra* was served on the persons stated below via first class U.S. Mail, postage prepaid, this 25th day of April, 2011.



Christopher J. Allwein
Assistant Consumers' Counsel

PERSONS SERVED

Kathy J. Kolich
Leila Vespoli
Firstenergy Service Company
76 South Main Street
Akron, Ohio 44308
kjkolich@firstenergycorp.com
lvespoli@firstenergycorp.com

William L. Wright
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
william.wright@puc.state.oh.us

Mark A. Whitt (Counsel of Record)
Christopher T. Kennedy
CARPENTER LIPPS & LELAND LLP
280Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
whitt@carpenterlipps.com
kennedy@carpenterlipps.com