

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

This is a case about whether FirstEnergy is complying with the laws of Ohio and the PUCO rules on corporate separation. Corporate separation is important to utility customers because without adequate corporate separation customers are at risk of adverse consequences associated with the exercise of market power. This could result in the wholesale generation markets not functioning properly and therefore not producing the lower prices that competitive markets would otherwise bring to customers.

Under Ohio Administrative Code (“OAC”) 4901-1-12 and 4901-1-23,¹ OCC moves the Public Utilities Commission of Ohio (“PUCO”), the legal director, the deputy legal director, or an attorney examiner for an order compelling FirstEnergy² to expeditiously respond to OCC’s First Set of Discovery, served on February 13, 2018. Specifically, OCC requests that the PUCO compel FirstEnergy to fully respond to the entire set of discovery, consisting of OCC Requests for Production of Documents Nos.

¹ See Ohio Adm. Code 4901-1-12 and 4901-1-23.

² FirstEnergy refers to Ohio Edison Company, The Toledo Edison Company, The Cleveland Electric Illuminating Company.

RPD-01 through RPD-09. These discovery requests and FirstEnergy's responses (all objections and no substantive responses) are attached as OCC Attachments 1 and 2.

OCC's discovery is important to better inform the PUCO's review of the audit report in this case, by providing the PUCO with a complete record upon which it can base its decision. Additionally, OCC's discovery will help OCC and other interested parties in preparing comments and replies in this proceeding. It will facilitate OCC in representing the interests of its clients, the 1.85 million residential customers of FirstEnergy.

The OCC has detailed in the attached affidavit,³ the efforts which it undertook to resolve differences between it and FirstEnergy, consistent with Rule 4901-1-23(C)(3). At this moment, FirstEnergy and OCC have failed to reach a mutually satisfactory solution to their differences.

OCC files this Motion to Compel, with the reasons supporting this motion set forth in the attached Memorandum in Support. OCC requests that the PUCO require FirstEnergy to fully respond to its discovery requests, post haste.

Respectfully submitted,

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³ OCC Attachment 4.

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 9, 2017, OCC intervened in this proceeding. As allowed under Ohio law and the PUCO rules, OCC sent FirstEnergy discovery seeking disclosure of discovery requests and responses between FirstEnergy and others (including the PUCO Staff, Auditor, other parties) (OCC RPD 1-4). OCC also sought a copy of the Audit contract and invoices (OCC RPD 5, 8) and copies of the draft audit report (and communications regarding the draft audit report) (OCC RPD 6.7). Finally, OCC sought documents pertaining to communications about this proceeding that FirstEnergy (and its affiliates) has had with parties to this proceeding. In all, OCC served nine requests for FirstEnergy to produce documents. (OCC Attachment 1).

On March 2, 2018, FirstEnergy served its response to OCC's discovery. (Attachment 2). FirstEnergy's response to each and every one of OCC's nine requests was identical:

This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

Upon receiving these responses, OCC initiated a dialogue with FirstEnergy's Counsel to discuss resolving the discovery dispute. FirstEnergy's Counsel informed OCC that it would reconsider its responses in light of the discussion. But, 12 days after the discussion with FirstEnergy's Counsel, OCC received word that instead FirstEnergy was not willing to change any of its discovery responses. The email stated that "[t]he Companies' position is that discovery is not warranted or appropriate before a final audit report is filed. The information that the Companies give to the auditor (who is the agent of Staff) is protected by ORC 4901.16. After the final audit report is filed, the Companies will supplement the discovery accordingly."

FirstEnergy's position is not defensible. It should be rejected by the PUCO for a number of reasons. First, FirstEnergy is mistaken that discovery is not "warranted or appropriate" prior to a final audit report. Under PUCO rules, discovery can commence immediately after a proceeding commences-- audit or no audit.⁴ Second, FirstEnergy is wrong in its assertion that R.C. 4901.16, which establishes obligations of the PUCO Staff, applies to it (a utility) and allows it to stonewall parties until the PUCO Staff investigation is complete. The PUCO should summarily reject that argument (as it has in the past),⁵ and allow discovery to proceed, as envisioned under Ohio law and PUCO Rules. Third, FirstEnergy is incorrect that it can fulfill its duty to respond to discovery by

⁴ Ohio Adm. Code 4901-1-17.

⁵ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-416-EL-AIR, Entry at 3 (granting OCC's motion to compel over the utility's claims that R.C. 4901.16 precludes them from responding to discovery where an investigation by the Staff was underway).

promising to subsequently supplement its responses, in place of providing a current answer.⁶

Additionally, the rote objection to OCC discovery, based on breadth, relevance, and burden should be overruled. FirstEnergy has failed to bear its burden of proving that the information sought is not relevant, is overly broad and would cause it undue burden to respond to. The PUCO should grant OCC's motion to compel and require the utility to expeditiously provide responses to OCC's discovery.

II. PARTIES' RIGHT TO DISCOVERY

According to the PUCO "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts."⁷ The PUCO's rules on discovery "*do not create an additional field of combat to delay trials or to appropriate the Commission's time and resources*"; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings."⁸ The rules are also intended to "minimize commission intervention in the discovery process."⁹ These rules are intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C. 4903.082.

⁶ See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Entry at ¶8 (Oct. 1, 2008) (finding that the PUCO rules do not allow a party to rely on a promise of subsequent supplementation in place of providing a current answer).

⁷ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

⁸ *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76. (Emphasis added).

⁹ Ohio Adm. Code 4901-1-16(A).

R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” Therefore the OCC, as a party in this proceeding,¹⁰ is entitled to timely and complete responses to its discovery inquiries. Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules.

Under its rules, the PUCO has established that “discovery may begin immediately after a proceeding is commenced.”¹¹ The PUCO has rejected tying discovery to case events, as FirstEnergy seeks to do (in delaying discovery until the audit report is issued). For instance, the PUCO has rejected the notion that discovery in a complaint proceeding may not commence without a PUCO finding of reasonable grounds.¹² The PUCO has also specifically refused to find that discovery should be held up before the issuance of a staff or audit report.¹³ Simply put, there is no statute or PUCO rule that prohibits OCC from engaging in discovery in this audit proceeding or otherwise limits OCC's right to conduct discovery before the audit report is filed.¹⁴

¹⁰ See Ohio Adm. Code 4901-1-16(H). OCC filed a Motion to intervene on June 9, 2017. Its motion to intervene has not been granted.

¹¹ Ohio Adm. Code 4901-1-17 (A). *Accord*, Ohio Civ. R. 33 (A) (interrogatories may be served by any party without leave on the plaintiff “after commencement of the action.”).

¹² *Office of Consumers' Counsel v. West Ohio Gas Co.*, Case No. 89-275-GAS-CSS, Entry, (Apr. 18, 1989); *Office of the Consumers' Counsel v. Dayton Power and Light Company*, Case No. 88-1744-EL-CSS, Entry (June 6, 1989). See also, *In the Matter of the Complaint of OCC v. Duke*, Case No. 15-1588-GE-CSS, Entry at fn. 3 (Oct. 11, 2017) (where the PUCO noted that “there is no basis in our rules for a party to stymie discovery while a motion to dismiss is under consideration.”).

¹³ See, e.g., *In the Matter of the Audit of Transportation Migration Rider --Part B of the East Ohio Gas Company*, Case No. 17-219-GA-EXR, Entry (Sept. 28, 2017) (rejecting utility's argument that discovery (before the audit report was issued) not be had as it would be redundant of auditor's review).

¹⁴ *Id.*

The PUCO has also adopted rules that specifically define the scope of discovery.

Ohio Adm. Code 4901-1-16(B) provides:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

The PUCO's rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.¹⁵

This scope of discovery is applicable to requests for production. Requests for production may elicit documents within the possession, custody, or control, of the party upon whom the discovery is served, under Ohio Adm. Code 4901-1-20.

OCC's right to discovery is assured by law, rule and Supreme Court of Ohio ("Court") precedent.¹⁶ OCC is entitled to timely and complete responses to its discovery inquiries. OCC seeks responses to its discovery requests and is unable to obtain the responses without the PUCO compelling FirstEnergy to respond.

In Ohio Adm. Code 4901-1-23, the PUCO provided the procedure for parties to obtain the enforcement of these discovery rights, guaranteed by law and rule. Ohio Adm. Code 4901-1-23(A) and (B) provide a means for the PUCO to compel a party to answer discovery when the party has failed to do so, including when answers are evasive or

¹⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, 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.

¹⁶ *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213.

incomplete. Ohio Adm. Code 4901-1-23(C) details the technical requirements for a motion to compel, all of which are met by OCC in this pleading.

The motion to compel is to be accompanied by a memorandum in support setting forth the basis of the motion and authorities relied upon; a brief explanation of how the information sought is relevant; and responses to objections raised by the party from whom the discovery is sought.¹⁷ Copies of the discovery requests and the responses are to be attached.¹⁸ Finally, Ohio Adm. Code 4901-1-23(C) also requires the party seeking discovery to file an affidavit explaining how it has exhausted all other reasonable means of resolving the differences with the party from whom the discovery is sought.

OCC has detailed in the attached affidavit, consistent with Ohio Adm. Code 4901-1-23(C)(3), the efforts that it undertook to resolve differences between it and FirstEnergy. At this point it is clear that there is no resolution. OCC seeks responses to its discovery from FirstEnergy and is unable to obtain the response without the PUCO compelling such a result.

III. ARGUMENT

A. The information OCC seeks is reasonably calculated to lead to the discovery of admissible evidence.

This case emanates from the PUCO Order adopting its Staff's recommendation that each Ohio electric utility be audited to ensure its compliance with R.C. 4928.17 and the PUCO's corporate separation rules¹⁹ and to further Ohio's policies under R.C.

¹⁷ See Ohio Adm. Code 4901-1-23(C)(1).

¹⁸ Ohio Adm. Code 4901-1-23(C)(2).

¹⁹ Ohio Adm. Code Chapter 4901:1-37.

4928.02.²⁰ FirstEnergy is the first electric distribution utility to undergo the prescribed audit.

The scope of the audit was further defined by the PUCO, through an approved request for proposal issued by PUCO Entry, dated May 17, 2017. There the Auditor was tasked with determining if FirstEnergy has complied with PUCO's Corporate Separation Rules, as enumerated in Ohio Adm. Code 4901:1-37-04(D)(3), 4901:1-37-04(D)(6), 4901:1-37-04(D)(10)(c), 4901:1-37-04(D)(11) and 4901:1-37-08(C). FirstEnergy did not at any time contest the PUCO's authority to conduct the audit. Nor did it contest the PUCO Order setting the scope of the audit.

OCC's discovery seeks copies of the discovery requests and responses made in this case between FirstEnergy and others (including the PUCO Staff, Auditor, other parties) (OCC RPD 1-4). (It is common practice for a company to provide to parties copies of its answers to staff data requests.)²¹ OCC also sought a copy of the Audit contract and invoices (OCC RPD 5, 8) and copies of the draft audit report (and communications regarding the draft audit report) (OCC RPD 6.7). Finally, OCC sought documents pertaining to communications about this proceeding that FirstEnergy (and its affiliates) has had with parties to this proceeding (OCC RPD 9).

OCC's requests are reasonably calculated to lead to the discovery of admissible evidence. The requests are limited to actual communications (in the form of documents) between parties in this case, including the Auditor, concerning the audit. Like it or not,

²⁰ *In re the Commission 's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at 16-17 (Mar. 26, 2014).

²¹ *See, e.g., In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-416-EL-AIR, Entry at 3 (Aug. 23, 1991)(acknowledging such a practice and ruling that the utility's reliance on R.C. 4901.16 was erroneous).

the audit is being conducted, guided by the broad scope the PUCO established --has FirstEnergy complied with the PUCO's corporate separation rules?

With FirstEnergy's blanket and rote objection on relevance (to each and every OCC request), OCC is being made to believe that all of the Auditor's requests and all of the utility's responses (reportedly over 300),²² submitted over the past eight months, are not relevant to determining whether FirstEnergy is complying with the PUCO's corporate separation rules. OCC cannot accept that broad assertion by FirstEnergy. And, neither should the PUCO. As the PUCO has found before, staff data requests are "certainly relevant."²³

The party opposing the discovery request has the burden to establish that the requested information would not reasonably lead to the discovery of admissible evidence.²⁴ With no support and no specifics provided for its objections on relevance, the PUCO must overrule FirstEnergy's objections.

B. FirstEnergy has failed to show how OCC's requests are overly broad and or unduly burdensome.

OCC's requests for production seek information about the audit being conducted in this case. Its requests do not go beyond the scope of this proceeding. Every request for production is tied to communications made (in the form of documents) "*in this proceeding.*"

Additionally, it does not appear to be unduly burdensome to produce what has been exchanged between FirstEnergy and the Auditor (and other parties), even if the

²² See FirstEnergy Memorandum Contra Staff's Motion for Extension of Time at 2 (Jan. 31, 2018).

²³ See, e.g., *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-416-EL-AIR, Entry at 3 (Aug. 23, 1991).

²⁴ *State ex rel. Fisher v. Rose Chevrolet, Inc.*, (C.A. 1992), 82 Ohio App.3d 520, 523.

number of communications amounts to 300 or so requests. The PUCO has in the past ruled that providing staff data requests and responses (in a rate case, no less) is not unduly burdensome.²⁵

FirstEnergy's objection that it is overly burdensome to respond to OCC's discovery has never been adequately explained to OCC. Such statements appear to be conclusory at best. FirstEnergy must do more than simply repeat the familiar litany that the discovery is burdensome. Federal case law²⁶ has held that, when a party objects to an interrogatory based on oppressiveness or undue burden, that party must show specifically how, despite the broad and liberal construction afforded discovery rules, each interrogatory is overly broad, burdensome, or oppressive.²⁷ In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.²⁸ General objections without specific support may result in waiver of the objection.²⁹

Here FirstEnergy has failed to show how the requests for production of information already being provided to the Staff, auditor or other parties are unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and

²⁵ See, e.g., *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-416-EL-AIR, Entry at 3 (Aug. 23, 1991)

²⁶ Although federal case law is not binding upon the PUCO with regard to interpreting the Ohio Civil Rules of Practice (upon which the PUCO discovery rules are based), it is instructive where, as here, Ohio's rule is similar to the federal rules. Ohio Adm. Code 4901-1-24 allows a protective order to limit discovery to protect against "undue burden and expense." C.R. 26(c) similarly allows a protective order to limit discovery "to protect against undue burden and expense." Cf. *In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 14-15 (Mar. 17, 1987), where the Commission opined that a motion for protective order on discovery must be "specific and detailed as to the reasons why providing the responses to matters***will be unduly burdensome."

²⁷ *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, (N.D. Ohio 1964), 37 F.R.D. 51, 54.

²⁸ *Roesberg v. Johns-Manville*, (M.D.Pa 1980), 85 RR.D. 292,297.

²⁹ *Id.*, citing *In re Folding Carton Anti-Trust Litigation*, (N.D. HI. 1978), 83 F.R.D. 251, 264.

explain its objections and to provide support³⁰ and FirstEnergy has failed to do so, the PUCO should overrule this objection.

C. FirstEnergy misinterprets R.C. 4909.16, which is no basis for it to withhold documents from OCC.

In an e-mail sent to OCC Counsel, after an OCC-initiated discussion seeking to resolve the discovery dispute, Counsel for FirstEnergy proclaims that "discovery is not warranted or appropriate before a final audit report is filed." (See OCC Attachment 3). FirstEnergy's presumption (that it can unilaterally determine when it is appropriate and not appropriate to conduct discovery) appears to stem from its interpretation of R.C. 4901.16. FirstEnergy's Counsel avers that "[t]he information that the Companies give to the auditor (who is the agent of Staff) is protected by ORC 4901.16." (OCC Attachment 3). Counsel for FirstEnergy offers to "supplement the discovery accordingly" after the Staff Report is issued. *Id.*

FirstEnergy misreads and misinterprets R.C. 4901.16. That statute creates obligations for PUCO employees or its agents for the treatment of public utility information acquired during an active PUCO investigation. Under R.C. 4901.16, except in a report to the commission, "no employee or agent ***"shall divulge information acquired by him in respect to the transaction, property, or business of any public utility while acting or claiming to act as such employee or agent."

The PUCO has held that "Section 4901.16 only prevents premature disclosure of information by the staff of the Commission. Nothing in that section prevents the

³⁰ *Gulf Oil Corp. v Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

company from providing information to parties in a case."³¹ Consistent with its precedent, the PUCO should overrule FirstEnergy's objection.

D. A promise to "supplement" discovery, once the auditor issues a report is an insufficient and evasive response to discovery.

As part of its dialogue with OCC, FirstEnergy conveyed that, after the final audit report is filed, it will supplement the discovery accordingly. (OCC Attachment 3).

FirstEnergy's response conveys its misunderstanding of the PUCO rules of discovery.

The PUCO's rules are designed to allow broad discovery of material that is relevant to the proceeding and to allow parties to prepare thoroughly and adequately. Under certain circumstances, a party is required to supplement its answers with new information, as it is obtained. Ohio Adm. Code 4901-1-16(D). However, the PUCO has held that the rules do not authorize a party to rely on a promise of subsequent supplementation in place of providing a current answer.³² FirstEnergy's promise of subsequent supplementation, in place of providing a current answer, should be rejected as inconsistent with the PUCO rules and precedent.

E. OCC undertook reasonable efforts to resolve the discovery dispute.

As detailed in the attached affidavit, OCC undertook efforts to resolve this discovery dispute. Shortly after receiving FirstEnergy's response, OCC contacted FirstEnergy's Counsel to set up a conference call to discuss the discovery. During the subsequent conference call OCC explained why it was seeking the information and

³¹ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-416-EL-AIR, Entry at 3 (granting OCC's motion to compel over R.C. 4901.16 claims and finding the answers to the staff data requests "are certainly relevant" and providing the responses is not unduly burdensome).

³² *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Entry at ¶8 (Oct. 1, 2008).

discussed how the information would be used. OCC also discussed with FirstEnergy Counsel how the utility's reliance on R.C. 49091.16 was unsound.

Counsel for FirstEnergy relayed that FirstEnergy would reconsider the responses and contact OCC within a matter of days. OCC re-contacted FirstEnergy after ten days had gone by, with no response. On day 12, OCC received a response from the utility indicating it was standing by its original responses and would not produce information to OCC until after the audit report was issued.

IV. CONCLUSION

FirstEnergy has failed to bear the burden of providing that OCC's discovery will not lead to the discovery of admissible evidence. Nor has FirstEnergy provided anything but conclusory statements as to the "burden" that will be imposed on it to answer OCC's nine requests for production. And FirstEnergy is just plain wrong that R.C. 4901.16 prevents it from providing information to OCC.

As such, it is appropriate and fitting that the PUCO, consistent with its rules and Ohio law, grant OCC's Motion to Compel. Granting OCC's motion to compel will further the interests of consumers by assisting OCC and other parties in preparing comments and reply comments in this proceeding. It will also better inform the PUCO's review of the audit report in this case, by providing it with a complete record upon which to base its decision. OCC's Motion to Compel should be granted and FirstEnergy should be ordered to respond to OCC's nine requests for production post haste.

Respectfully submitted,

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/s/ Maureen R. Willis

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Compel was served on the persons stated below via electronic transmission, this 29th day of March 2018.

/s/ Maureen R. Willis
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THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of The Ohio Edison)
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Compliance with R.C. 4928.17 and the Ohio)
Adm. Code Chapter 4901:1-37.)

**REQUEST FOR PRODUCTION OF DOCUMENTS PROPOUNDED UPON
FIRSTENERGY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
FIRST SET**

(FEBRUARY 13, 2018)

The Office of the Ohio Consumers' Counsel in the above-captioned proceedings before the Public Utilities Commission of Ohio submits the following Requests for Production of Documents pursuant to Sections 4901-1-19, 4901-1-20 and 4901-1-22 of the Ohio Adm. Code for response from the FirstEnergy EDUs within 20 days, and no later than any shorter period required by the Public Utilities Commission of Ohio or its authorized representative. An electronic response (e.g., Excel) should be provided with hard copies of materials not available electronically, to the extent possible, to the Office of the Ohio Consumers' Counsel at the following addresses:

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Additionally, the FirstEnergy EDUs must follow the instructions provided herein in responding to the inquiries. Definitions are provided below that are used in the Office of the Ohio Consumers' Counsel's discovery.

DEFINITIONS

As used herein the following definitions apply:

1. "Document" or "Documentation" when used herein, is used in its customary broad sense, and means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody, or control regardless of where located; including any kind of printed, recorded, written, graphic, or photographic matter and things similar to any of the foregoing, regardless of their author or origin. The term specifically includes, without limiting the generality of the following: punchcards, printout sheets, movie film, slides, PowerPoint slides, phonograph records, photographs, memoranda, ledgers, work sheets, books, magazines, notebooks, diaries, calendars, appointment books, registers, charts, tables, papers, agreements,

contracts, purchase orders, checks and drafts, acknowledgments, invoices, authorizations, budgets, analyses, projections, transcripts, minutes of meetings of any kind, telegrams, drafts, instructions, announcements, schedules, price lists, electronic copies, reports, studies, statistics, forecasts, decisions, and orders, intra-office and inter-office communications, correspondence, financial data, summaries or records of conversations or interviews, statements, returns, diaries, workpapers, maps, graphs, sketches, summaries or reports of investigations or negotiations, opinions or reports of consultants, brochures, bulletins, pamphlets, articles, advertisements, circulars, press releases, graphic records or representations or publications of any kind (including microfilm, videotape and records, however produced or reproduced), electronic (including e-mail), mechanical and electrical records of any kind and computer produced interpretations thereof (including, without limitation, tapes, tape cassettes, disks and records), other data compilations (including, source codes, object codes, program documentation, computer programs, computer printouts, cards, tapes, disks and recordings used in automated data processing together with the programming instructions and other material necessary to translate, understand or use the same), all drafts, prints, issues, alterations, modifications, changes, amendments, and mechanical or electric sound recordings and transcripts to the foregoing. A request for discovery concerning documents addressing, relating or referring to, or discussing a specified matter encompasses documents having a factual, contextual, or logical nexus to the matter, as well as documents making explicit or implicit reference thereto in the body of the documents. Originals and

duplicates of the same document need not be separately identified or produced; however, drafts of a document or documents differing from one another by initials, interlineations, notations, erasures, file stamps, and the like shall be deemed to be distinct documents requiring separate identification or production.

Copies of documents shall be legible.

2. “Communication” shall mean any transmission of information by oral, graphic, written, pictorial, or otherwise perceptible means, including, but not limited to, telephone conversations, letters, telegrams, and personal conversations. A request seeking the identity of a communication addressing, relating or referring to, or discussing a specified matter encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication.
3. The “substance” of a communication or act includes the essence, purport or meaning of the same, as well as the exact words or actions involved.
4. “And” or “Or” shall be construed conjunctively or disjunctively as necessary to make any request inclusive rather than exclusive.
5. “You,” and “Your,” or “Yourself” refer to the party requested to produce documents and any present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venturer of such party.
6. Each singular shall be construed to include its plural, and vice versa, so as to make the request inclusive rather than exclusive.

7. Words expressing the masculine gender shall be deemed to express the feminine and neuter genders; those expressing the past tense shall be deemed to express the present tense; and vice versa.
8. “Person” includes any firm, corporation, joint venture, association, entity, or group of natural individuals, unless the context clearly indicates that only a natural individual is referred to in the discovery request.
9. “Identify,” or “the identity of,” or “identified” means as follows:
 - A. When used in reference to an individual, to state his full name and present or last known position and business affiliation, and his position and business affiliation at the time in question;
 - B. When used in reference to a commercial or governmental entity, to state its full name, type of entity (e.g., corporation, partnership, single proprietorship), and its present or last known address;
 - C. When used in reference to a document, to state the date, author, title, type of document (e.g., letter, memorandum, photograph, tape recording, etc.), general subject matter of the document, and its present or last known location and custodian;
 - D. When used in reference to a communication, to state the type of communication (i.e., letter, personal conversation, etc.), the date thereof, and the parties thereto and the parties thereto and, in the case of a conversation, to state the substance, place, and approximate time thereof, and identity of other persons in the presence of each party thereto;

- E. When used in reference to an act, to state the substance of the act, the date, time, and place of performance, and the identity of the actor and all other persons present.
 - F. When used in reference to a place, to state the name of the location and provide the name of a contact person at the location (including that person's telephone number), state the address, and state a defining physical location (for example: a room number, file cabinet, and/or file designation).
- 10. The terms "PUCO" and "Commission" refer to the Public Utilities Commission of Ohio, including its Commissioners, personnel (including Persons working for the PUCO Staff as well as in the Public Utilities Section of the Ohio Attorney General's Office), and offices.
 - 11. The term "e.g." connotes illustration by example, not limitation.
 - 12. "OCC" means the Office of the Ohio Consumers' Counsel.
 - 13. "OE" means Ohio Edison Company, "CEI" means The Cleveland Electric Illuminating Company and "TE" means The Toledo Edison Company.
 - 14. "FirstEnergy's EDUs" and "the Company" means OE, CEI, and TE collectively.
 - 15. "FirstEnergy Solutions" means the affiliate of OE, CEI, and TE that owns generating plants, some or all of which were formerly owned by FirstEnergy's EDUs.
 - 16. "ATSI" means the American Transmission Service, Incorporated, the affiliate of OE, CEI, and TE that owns transmission facilities located in an around Ohio.

17. “FirstEnergy-Affiliated Companies” means the FirstEnergy EDUs and their affiliated companies (including, but not limited to, FirstEnergy Solutions and ATSI).
18. “Application” means the Corporate Separation Plan filed by the FirstEnergy Companies on April 12, 2017 in Case No. 17-0974-EL-UNC.

INSTRUCTIONS FOR ANSWERING

1. All information is to be divulged which is in your possession or control, or within the possession or control of your attorney, agents, or other representatives of yours or your attorney.
2. Where an interrogatory calls for an answer in more than one part, each part should be separate in the answer so that the answer is clearly understandable.
3. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them.
4. If any answer requires more space than provided, continue the answer on the reverse side of the page or on an added page.
5. Your organization(s) is requested to produce responsive materials and information within its physical control or custody, as well as that physically controlled or possessed by any other person acting or purporting to act on your behalf, whether as an officer, director, employee, agent, independent contractor, attorney, consultant, witness, or otherwise.
6. Where these requests seek quantitative or computational information (e.g., models, analyses, databases, and formulas) stored by your organization(s) or its consultants in computer-readable form, in addition to providing hard copy (if an electronic response is not otherwise provided as requested), you are requested to produce such computer-readable information, in order of preference:
 - A. Microsoft Excel worksheet files on compact disk;

- B. other Microsoft Windows or Excel compatible worksheet or database diskette files;
 - C. ASCII text diskette files; and
 - D. such other magnetic media files as your organization(s) may use.
7. Conversion from the units of measurement used by your organization(s) in the ordinary course of business need not be made in your response; e.g., data requested in kWh may be provided in mWh or gWh as long as the unit measure is made clear.
8. Unless otherwise indicated, the following requests shall require you to furnish information and tangible materials pertaining to, in existence, or in effect for the whole or any part of the period from January 1, 2000 through and including the date of your response.
9. Responses must be complete when made, and must be supplemented with subsequently acquired information at the time such information is available.
10. In the event that a claim of privilege is invoked as the reason for not responding to discovery, the nature of the information with respect to which privilege is claimed shall be set forth in responses together with the type of privilege claimed and a statement of all circumstances upon which the respondent to discovery will rely to support such a claim of privilege (i.e. provide a privilege log). Respondent to the discovery must a) identify (see definition) the individual, entity, act, communication, and/or document that is the subject of the withheld information based upon the privilege claim, b) identify all persons to whom the information has already been

revealed, and c) provide the basis upon which the information is being withheld and the reason that the information is not provided in discovery.

REQUESTS FOR PRODUCTION OF DOCUMENTS

* In accordance with Ohio Adm. Code 4901-1-19(A), please provide the name of the person(s) responsible for your response to each Request for Production of Documents and the name of the attorney(s) making any objections to Request for Production of Documents. In accordance with Ohio Adm. Code 4901-1-16(D)(5), OCC specifically requests that all responses be supplemented with subsequently acquired information at the time such information is available.

RPD-1-001. Please provide a copy of all informal and formal requests (e.g., interrogatories, data requests) in this Proceeding made to the FirstEnergy-Affiliated Companies by 1) the PUCO; 2) the PUCO Staff; 3) the PUCO's Attorneys General; and 4) the Auditor.

RPD-1-002. Please provide the FirstEnergy-Affiliated Companies' response to each informal and formal request identified in response to RPD-1-001.

RPD-1-003. Please provide a copy of all informal and formal requests (e.g., interrogatories, data requests) in this Proceeding made to the FirstEnergy-Affiliated Companies by any other party.

RPD-1-004. Please provide the FirstEnergy-Affiliated Companies' response to each informal and formal request identified in response to RPD-1-003.

RPD-1-005. Please provide a copy of each contract entered into between the FirstEnergy-Affiliated Companies and the Auditor for audit services in this Proceeding.

- RPD-1-006. Please provide any draft audit reports received in this Proceeding by the FirstEnergy-Affiliated Companies from 1) the PUCO; 2), the PUCO Staff; 3) the PUCO's Attorneys General; and 4) the Auditor.
- RPD-1-007. Please provide any communications made in connection with this proceeding between the FirstEnergy-Affiliated Companies and 1) the PUCO; 2) the PUCO Staff; 3) the PUCO's Attorneys General; and 4) , the Auditor relating to any draft audit reports identified in response to RPD-1-006.
- RPD-1-008. Please provide a copy of all invoices submitted by the Auditor to the FirstEnergy-Affiliated Companies.
- RPD-1-009. Please provide a copy of all communications between FirstEnergy-Affiliated Companies and any party to this proceeding, including the PUCO staff, and the PUCO's Attorneys General, pertaining to the application in this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request for Production of Documents Propounded Upon FirstEnergy by the Office of the Ohio Consumers' Counsel, First Set, was served via electronic transmission upon the parties this 13th day of February 2018.

/s/ Maureen R. Willis
Maureen R. Willis
Senior Regulatory Counsel
Assistant Consumers' Counsel

SERVICE LIST

Thomas.lindgren@ohioattorneygeneral.gov
joliker@igsenergy.com
Mnugent@igsenergy.com

cdunn@firstenergycorp.com

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-1**

Please provide a copy of all informal and formal requests (e.g., interrogatories, data requests) in this Proceeding made to the FirstEnergy-Affiliated Companies by 1) the PUCO; 2) the PUCO Staff; 3) the PUCO's Attorneys General; and 4) the Auditor.

Response:

This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-2** Please provide the FirstEnergy-Affiliated Companies' response to each informal and formal request identified in response to RPD-1-001.

Response: This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-3**

Please provide a copy of all informal and formal requests (e.g., interrogatories, data requests) in this Proceeding made to the FirstEnergy-Affiliated Companies by any other party.

Response:

This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-4**

Please provide the FirstEnergy-Affiliated Companies' response to each informal and formal request identified in response to RPD-1-003.

Response:

This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-5**

Please provide a copy of each contract entered into between the FirstEnergy-Affiliated Companies and the Auditor for audit services in this Proceeding.

Response:

This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-6**

Please provide any draft audit reports received in this Proceeding by the FirstEnergy-Affiliated Companies from 1) the PUCO; 2), the PUCO Staff; 3) the PUCO's Attorneys General; and 4) the Auditor.

Response:

This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-7** Please provide any communications made in connection with this proceeding between the FirstEnergy-Affiliated Companies and 1) the PUCO; 2) the PUCO Staff; 3) the PUCO's Attorneys General; and 4) , the Auditor relating to any draft audit reports identified in response to RPD-1-006.

Response: This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-8**

Please provide a copy of all invoices submitted by the Auditor to the FirstEnergy-Affiliated Companies.

Response:

This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

OCC Set 1

Case No. 17-0974-EL-UNC

Compliance Audit of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company with the Corporate Separation Rules of the Public
Utilities Commission of Ohio

REQUEST FOR PRODUCTION OF DOCUMENTS

**OCC Set 1 –
RPD-9**

Please provide a copy of all communications between FirstEnergy-Affiliated Companies and any party to this proceeding, including the PUCO staff, and the PUCO's Attorneys General, pertaining to the application in this proceeding.

Response:

This request is overbroad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Furthermore, the documents are protected under 4901.16, Revised Code.

Bingham, Debra

From: Dunn-Lucco, Carrie M <cdunn@firstenergycorp.com>
Sent: Tuesday, March 20, 2018 1:37 PM
To: Willis, Maureen
Subject: RE: Discovery 17-0974

Hello Maureen:

Thank you for your patience and for the conversation that we had regarding this issue. The Companies' position is that discovery is not warranted or appropriate before a final audit report is filed. The information that the Companies give to the auditor (who is the agent of Staff) is protected by ORC 4901.16. After the final audit report is filed, the Companies will supplement the discovery accordingly.

Thanks again,

Carrie

Carrie M. Dunn-Lucco
Attorney
FirstEnergy Service Company
76 S. Main St.
Akron, OH 44308
Tel: 330-761-2352
Fax: 330-384-3875
cdunn@firstenergycorp.com

From: Maureen.Willis@occ.ohio.gov [<mailto:Maureen.Willis@occ.ohio.gov>]
Sent: Friday, March 16, 2018 10:39 AM
To: Dunn-Lucco, Carrie M <cdunn@firstenergycorp.com>
Subject: [EXTERNAL] Discovery 17-0974

Just checking on the issues we discussed last week. Please let me know where that stands. Thanks.

Maureen R. Willis

Senior Regulatory Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Direct Dial: (614) 466-9567
Maureen.willis@occ.ohio.gov

CONFIDENTIALITY NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT OR BELIEVE THAT YOU ARE NOT THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY AND INDICATE THAT YOU HAVE RECEIVED THIS MESSAGE, THEN IMMEDIATELY DELETE IT AND ALL OTHER COPIES OF IT. THANK YOU.

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**AFFIDAVIT OF MAUREEN R. WILLIS IN SUPPORT OF MOTION TO
COMPEL RESPONSES TO DISCOVERY**

I, Maureen R. Willis, attorney for the Ohio Consumers' Counsel ("OCC") in the above-captioned case, submit this affidavit in support of OCC's Motion to Compel Responses to Discovery.

1. OCC served its 1st set of discovery requests on Duke Energy Ohio, Inc. on February 13, 2018. A true and correct copy of OCC's First set of discovery requests is attached as Attachment 1.

2. On March 5, 2018, FirstEnergy sent OCC an email, purported to be the response to OCC's discovery. The e-mail did not contain the file with the Companies' response. On March 6, 2018, OCC received an email with an attached file containing FirstEnergy's response.

3. That same day, March 5, 2018, OCC contacted FirstEnergy's Counsel, Carrie M. Dunn-Lucco seeking to set up a conference call to discuss FirstEnergy's objections to OCC's discovery.

4. On March 8, 2018, a conference call was held to discuss FirstEnergy's responses. I explained to Ms. Dunn-Lucco why OCC was seeking the information and

how it was related to the case. We discussed FirstEnergy's reliance on R.C. 4901.16.

Ms. Dunn-Lucco relayed that she would talk to her client about providing substantive responses and would be able to get back to me early the following week (Mar. 12 or 13, 2018).


5. On Friday, March 16, 2018, I inquired, through e-mail, of the status of the discovery issues we had discussed the week before. On Tuesday, March 20, 2018, Ms. Dunn-Lucco advised that FirstEnergy had not changed its position on the discovery, despite our discussion, and would not respond further until the final audit report is filed. (Attachment 3) (The final audit report is due May 14, 2018). Later that day, I advised Ms. Dunn-Lucco that OCC would be filing a motion to compel.

6. There have been no further communications with FirstEnergy on this matter.

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

The undersigned, being of lawful age and duly sworn on oath, hereby certifies,
deposes and states the following:

I have caused to be prepared the attached written affidavit for OCC in the above
referenced docket. This affidavit is true and correct to the best of my knowledge,
information and belief.


Maureen R. Willis, Affiant

Subscribed and sworn to before me this 29th day of March 2018.


Notary Public



Debra Jo Bingham, Notary Public
Union County, State of Ohio
My Commission Expires June 13, 2020

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/29/2018 4:35:06 PM

in

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

Summary: Motion Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.