

**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.)

**REPLY IN SUPPORT OF
MOTION TO COMPEL RESPONSES TO DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

Maureen R. Willis (0020847)
Counsel of Record
Senior Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone: Willis Direct – 614-466-9567
Maureen.willis@occ.ohio.gov
(Will accept service via email)

TABLE OF CONTENTS

| | Page |
|--|-------------|
| A. Under Ohio law and PUCO rules, discovery can and should begin immediately after a proceeding has commenced and should be completed as expeditiously as possible. Requiring OCC to wait until after the audit report is issued or later, will only serve to unduly delay and prolong this proceeding. | 4 |
| B. OCC's discovery requests are relevant and not overly broad. | 11 |
| C. Revised Code 4901.16 does not preclude FirstEnergy from responding to discovery requests. | 13 |
| D. There is no undue burden to FirstEnergy to respond to OCC's nine requests for production..... | 17 |
| E. Conclusion. | 18 |

**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.)

**REPLY IN SUPPORT OF
MOTION TO COMPEL RESPONSES TO DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In March of 2014, the PUCO found "it is imperative that utility and affiliate activities undergo vigilant monitoring in order to ensure their compliance with R.C. 4928.17 and Ohio Adm. Code 4901:1-37, and in order to further Ohio's policies pursuant to R.C. 4928.02."¹ Toward that end, the PUCO ordered all electric distribution utilities to be audited, every four years, to determine if they are complying with Ohio's corporate separation laws and rules.

This proceeding is the first of the electric industry audits where the PUCO and interested parties will have the opportunity to analyze corporate separation issues, with the help of a PUCO-ordered audit² (that customers will pay for). Corporate separation is important to customers because, as noted by the PUCO Staff, there is the potential for utilities to use competitive information unfairly, which could have a direct impact on the market and be detrimental to marketers and consumers.³

¹ *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at 16 (Mar. 26, 2014).

² The PUCO described the audits as "beneficial in monitoring utility and affiliate activities." *Id.* at 17.

³ *Id.*, PUCO Staff Report at 12 (Jan. 16, 2014).

To assist OCC in analyzing whether FirstEnergy is engaging in activities that could be harmful to customers, OCC served nine requests for production on FirstEnergy. The documents OCC requested included discovery requests and responses between FirstEnergy and other parties (including the PUCO Staff and Auditor) (OCC RPD 1-4); the audit contract and invoices (OCC RPD 5, 8); copies of the draft audit report (and communications regarding the draft audit report) (OCC RPD 6, 7); and documents pertaining to communications about this proceeding that FirstEnergy (and its affiliate) has had with parties to the proceeding (OCC RPD 9). (*See* OCC Attachment 1, Motion to Compel).

FirstEnergy's response to OCC for each and every one of its nine discovery requests was the same: Objection. No attempt was made to distinguish any of the requests from another. No attempt was made to give partial responses. The blanket objections put forth by FirstEnergy included that the discovery was "overbroad," "unduly burdensome," "seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence," and the "documents are protected under 4901.16, Revised Code."(*See* OCC Attachment 2, Motion to Compel).

On March 29, 2018, after undertaking reasonable efforts to resolve the discovery dispute (*See* OCC Attachment 4, Motion to Compel), OCC filed a motion to compel. On April 13, 2018, FirstEnergy filed its Memorandum Contra OCC's Motion to Compel. FirstEnergy believes it, (not the PUCO), can unilaterally decide that discovery should not be permitted. It declares that "OCC should be required, at the very least, to wait until the Commission sets a procedural schedule following the issuance of the auditor's report."⁴

⁴ FirstEnergy Memo Contra at 7 (Apr. 13, 2018).

FirstEnergy's relies on three assertions to support its "wait and see" approach to discovery, none of which hold water. The PUCO should accordingly grant OCC's Motion to Compel and require FirstEnergy to respond expeditiously to OCC's nine requests for production.

FirstEnergy claims that OCC's discovery is "premature" because there is no procedural schedule and no procedural schedule means no discovery.⁵ FirstEnergy's opinion though finds little support and is contrary to Ohio law (R.C. 4903.082) and PUCO rules (Ohio Adm. Code 4901-1-17) allowing discovery "to begin immediately after a proceeding is commenced" and providing that discovery "should be completed as expeditiously as possible."

Additionally, FirstEnergy alleges that OCC's discovery is not relevant and overly broad, because, among other things, it seeks copies of the auditor's requests (and FirstEnergy's responses to the Auditor).⁶ In this regard, FirstEnergy appears to take issue with the breadth of the auditor's inquiry, not with OCC's requests per se. But the battle over the scope of the audit is long over and FirstEnergy failed to object to the scope when it had a chance. Its belated arguments should be disregarded.

Finally, FirstEnergy seeks to hide behind R.C. 4901.16, asserting that it should not have to respond to OCC's discovery because if it did, there would be a chilling effect on its free and open sharing of information with the PUCO Staff.⁷ Such a claim is

⁵ FirstEnergy Memo Contra at 5-9.

⁶ *Id.* at 9-11.

⁷ *Id.* at 11-12.

meritless, misconstrues the statute, and is contrary to PUCO precedent on that very issue-
-precedent that OCC raised⁸, and FirstEnergy did not respond to.

The PUCO should easily see through FirstEnergy's transparent attempt at preventing OCC from gathering and analyzing information about FirstEnergy's activities-activities that could be harmful to customers and the markets they depend upon to achieve reasonably priced electric service. The PUCO should grant OCC's Motion to compel and order FirstEnergy to expeditiously respond to OCC's nine discovery requests.

A. Under Ohio law and PUCO rules, discovery can and should begin immediately after a proceeding has commenced and should be completed as expeditiously as possible. Requiring OCC to wait until after the audit report is issued or later, will only serve to unduly delay and prolong this proceeding.

FirstEnergy asserts that OCC's request are, "at best, premature."⁹ FirstEnergy's assertion is premised on its belief that because there is no procedural schedule, no right to discovery exists.¹⁰ FirstEnergy cites to a 2006 rules case¹¹ where the PUCO declined to amend its rules to broadly define a "proceeding," as extending *to all matters* before the PUCO. There the PUCO ruled that the right to intervene, conduct discovery, and present evidence does not exist *in all PUCO cases*.¹² The PUCO also held that such a broad

⁸ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Field Tariffs*, Case No. 91-418-EL-AIR, Entry at 3 (Aug. 23, 1991)(granting OCC's motion to compel despite R.C. 4901.16 claims and finding the answers to staff data requests "are certainly relevant" and providing the responses to such data requests are not unduly burdensome).

⁹ FirstEnergy Memo Contra at 5.

¹⁰ FirstEnergy Memo Contra at 7.

¹¹ *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶7 (Dec. 6, 2006).

¹² *Id.*

definition would usurp its discretion to conduct proceedings as it deems fit and would delay the outcome of many cases.¹³

Here though it is FirstEnergy that seeks to usurp the PUCO's discretion to conduct its proceedings. It does so by unilaterally deciding that no right to discovery exists before the Auditor issues its final report (or some undefined time thereafter¹⁴). And it is FirstEnergy (not OCC) that seeks to delay the outcome of this case. The PUCO should not be swayed by such arguments. Instead the PUCO should exercise its discretion in this proceeding to allow discovery to go forward now so that OCC can itself review FirstEnergy's activities that may be harmful to customers and the competitive market they rely upon to achieve reasonably priced generation service. There are many reasons to do so.

First, in this proceeding there will be a filed audit report, containing the findings of the Auditor's investigation into whether FirstEnergy is complying with corporate separation requirements. Generally, when audits are conducted, parties are afforded the opportunity to address the audit findings. It is unheard of for an audit report to be issued, with no opportunity to comment on or respond to the auditor's findings. The PUCO rules, Ohio Adm. Code 4901-1-28(E), in fact establish that parties should be granted the opportunity to submit testimony, file comments, or file objections to an audit. Allowing discovery now will assist OCC and other interested parties in preparing responses to the audit and advocating for customers to be protected from any anti-competitive practices of

¹³ Interestingly, in that same rules review, the PUCO on rehearing, refused to add "whether a hearing will be held in the proceeding" as mandatory criteria it must consider when ruling on intervention. *Id.*, Entry on Rehearing at ¶11 (Apr. 4, 2007).

¹⁴ FirstEnergy Memo Contra at 7 (urging that OCC be required, "at the very least, to wait until the Commission sets a procedural schedule following the issuance of the auditor's report.").

FirstEnergy. And allowing discovery now is consistent with the PUCO Entry in this proceeding that established parties' rights in this proceeding: "[A]ny conclusions, results, or recommendations formulated by the auditor may be examined by any participant to this proceeding."¹⁵ Allowing discovery now will also better inform the PUCO's review of the audit report in this case.

Allowing discovery to go forward now is also consistent with R.C. 4903.082. Under that statute, " parties and intervenors shall be afforded ample rights of discovery." While FirstEnergy avers that this statute does not require the PUCO to allow for discovery in all matters, (FirstEnergy Memo Contra at 8), it can only come up with two cases that support its view, neither of which can be relied upon. The first case, the *East Ohio Gas PIP* case¹⁶ is distinguishable from the case at hand. The second case FirstEnergy relies upon¹⁷ was superseded to a large degree by the Ohio Supreme Court's ruling in *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384.

In the *East Ohio Gas Co. PIP* case¹⁸ cited by FirstEnergy, the application under review was subject to a 45-day automatic approval process. Twenty days after the application was approved, OCC filed a motion to compel discovery. The PUCO ruled that since it had already approved the application, and had denied OCC intervention, the

¹⁵ *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*, Entry at ¶8 (May 17, 2017).

¹⁶ *In the Matter of the Applications of the East Ohio Gas Company for Adjustment of Their Interim Emergency and Temporary Percentage of Income Payment Plan Riders*, Case No. 05-1421-GA-PIP, Entry on Rehearing (Mar. 7, 2006).

¹⁷ *In the Matter of the Joint Application of Cinergy Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER *et al.*, Entry on Rehearing (Feb. 1, 2006) (*Cinergy Merger* case).

¹⁸ *Id.*

motion to compel should also be denied.¹⁹ In the present case, there is no auto-approval, the PUCO has not rendered a decision, and OCC's intervention has not been denied. These are distinguishing factors that make the *East Ohio Gas Co. PIP* holding inapplicable.

And with respect to the *Cinergy Merger* proceeding²⁰ that FirstEnergy relies upon, the PUCO's holdings there have been greatly diminished by a later holding of the Ohio Supreme Court in *Consumers' Counsel v Pub. Util. Comm.*, 111 Ohio St.3d 384. In the *Cinergy Merger* proceeding, the PUCO ruled that R.C. 4903.082 does not require ample discovery for an individual consumer who had not been granted intervention.²¹ But, then, in an earlier and related holding in that case (concerning the PUCO's stay of discovery), the PUCO noted that its own rules (Ohio Adm. Code 4901-1-16(H)) would allow discovery to commence even though a motion to intervene had not been granted.²² It then fell back on the fact that it had not determined whether a hearing would be held, and absent a hearing, there is no right to discovery.²³

But approximately ten months after the PUCO rulings in the *Cinergy Merger* case, the Ohio Supreme Court issued its landmark decision in *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384. There the Court ruled that the PUCO abused its discretion in denying OCC intervention in cases where the utility was seeking accounting

¹⁹ *Id.*, Entry at ¶6 (Feb. 1, 2006); Entry on Rehearing at ¶11 (Mar. 7, 2006).

²⁰ *In the Matter of the Joint Application of Cinergy Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER et al, Entry on Rehearing (Feb 1, 2006).

²¹ *Id.* at 11.

²² *Id.*, Entry on Rehearing at ¶14 (Dec. 7, 2005).

²³ *Id.*

changes. The Court ruled "[e]ven if no hearing was scheduled or contemplated when the Consumers' Counsel sought to intervene, her motions and accompanying memoranda properly addressed the relevant criteria of R.C. 4903.22. In our view, whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."²⁴

The Court's ruling, issued after the PUCO's ruling in the *Cinergy Merger* case, has changed the law of Ohio on intervention and discovery. If it is improper to deny intervention on the basis that there is no hearing, it is also improper to deny discovery when there is no hearing. No longer can parties legitimately argue that if there is no hearing, there is no right to intervene and no right to discovery. With or without a hearing, parties' interests can be affected, as noted by the Court. When parties' interests can be affected, parties should be entitled to advocate for those interests. Discovery can be an important part of that advocacy. As the PUCO rules acknowledge, permitting discovery allows parties to obtain information that can be used to "facilitate thorough and adequate preparation for participation in commission proceedings." Ohio Adm. Code 4901-1-16 (A). Allowing the discovery now will assist OCC in advocating for consumer interests that include protecting consumers from anti-competitive practices of FirstEnergy that could harm the competitive market for generation that consumers rely upon to achieve reasonably priced electric service.

FirstEnergy also argues that even if R.C. 4903.082 applies "there are at least two limiting principles to the standard for proper discovery." FirstEnergy Memo Contra at 8.

²⁴ *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, ¶20.

FirstEnergy claims that the PUCO rules require that a hearing occur -- and with no hearing, there will be no evidence, and thus nothing to "lead to the discovery of admissible evidence."²⁵ Second, FirstEnergy opines that the discovery request must have some relationship to relevant issues.²⁶ It further posits that any discovery is "premature until there is a demonstrated need or plan for a hearing or, at the very least, the final report is issued."²⁷

Allowing discovery to go forward now (instead of waiting for the Auditor's report) is also consistent with PUCO rules. According to Ohio Adm. Code 4901-1-17 "discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible." This rule recognizes the importance of timely discovery, so that the PUCO processes are not unduly delayed while parties wrangle over discovery issues. Under the PUCO's rules, for purposes of discovery, OCC is considered a party, entitled to serve discovery, because its motion to intervene was (and is) pending at the time the discovery was served. *See* Ohio Adm. Code 4901-1-16(H). As a party in this case, OCC represents the interests of residential customers who could be harmed if FirstEnergy is engaged in anti-competitive activities which harm the competitive generation market. On the other hand, FirstEnergy's approach to the discovery --waiting till at least the audit report has been issued-- is contrary to this PUCO rule and will unduly delay the progress of this important proceeding.

FirstEnergy's arguments, which would constrict discovery in the PUCO proceedings so that discovery is not allowed when there is no hearing, ignore the

²⁵ FirstEnergy Memo Contra at 8.

²⁶ *Id.*

²⁷ *Id.*

Supreme Court's holding in *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384. And its arguments are inconsistent with the wide-open scope of discovery in the PUCO rules of practice (and the underlying Ohio Civil Rules of Practice). Those rules allow parties to a PUCO proceeding to obtain "discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding." Ohio Adm. Code 4901-1-16(B). Admissibility of evidence is not the standard for determining whether discovery is proper. ("It is not a ground for objection [to discovery] that the information sought would be inadmissible ***").²⁸

The PUCO should also reject FirstEnergy's proposed "limiting principles to the standard for proper discovery."²⁹ There is no statute, rule, or precedent to support FirstEnergy's interpretation. Rather, the PUCO has rejected such approaches. As indicated in OCC's Motion to Compel the PUCO has not restricted discovery to case events, as FirstEnergy seeks to do (in delaying discovery until an audit report is issued).³⁰ Contrary to FirstEnergy's assertions otherwise³¹ complaint cases *do not require a hearing*. Hearings in complaint cases are only held "if it appears reasonable grounds for complaint are stated."³² Thus, the fact the PUCO has allowed discovery to go forward in

²⁸ Ohio Adm. Code 4901-1-16(B).

²⁹ FirstEnergy Memo Contra at 8.

³⁰ See *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"); *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).

³¹ FE Memo Contra at 8, mistakenly asserting that "in complaint cases, discovery and evidence are clearly contemplated *because there is a hearing*." (emphasis added).

³² See R.C. 4925.06 ("if it appears that reasonable ground for complaint are stated, the commission shall fix a time for hearing").

complaint cases, without a hearing being scheduled, is precedent for allowing discovery to go forward here without a procedural schedule being issued.

B. OCC's discovery requests are relevant and not overly broad.

FirstEnergy alleges that OCC's request for data requests and responses, including communications between FirstEnergy and the Auditor, are "on their face, overly broad."³³ It then goes on to complain about the number of data requests FirstEnergy has received from the Auditor ("245 requests (not including subparts))."³⁴ FirstEnergy apparently believes the Auditor's requests have been too broad, extending to "every aspect of the Companies' operations."³⁵ FirstEnergy also asserts that the PUCO "indicated that the role of parties [in this proceeding] would be limited to examination of the 'conclusions, results or recommendations formulated by the auditor.'"³⁶ FirstEnergy claims that OCC has not discussed why it needs each and every single data request and response, and that granting OCC "broad access" is not appropriate.³⁷ The PUCO should reject all of these arguments.

First, the PUCO did not limit the role of parties in this proceeding as FirstEnergy asserts. One need only look at the PUCO Order to see that FirstEnergy is wrong. The PUCO instead ruled that:

³³ FirstEnergy Memo Contra at 9.

³⁴ *Id.* at 8-9. In earlier pleadings, FirstEnergy claimed the requests numbered "almost 300." *See, e.g.*, FirstEnergy Memo Contra PUCO Staff Motion for Extension of Time at 2 (Jan. 31, 2018). This begs the question; which allegation is correct --245 or 300 data requests?

³⁵ FirstEnergy Memo Contra at 10.

³⁶ *Id.*

³⁷ *Id.*

The auditor shall perform its audit and investigation as an independent contractor. *Any conclusions, results, or recommendations formulated by the auditor may be examined by any participant to this proceeding.*³⁸

There is no expressed limitation on parties' rights contained here. Nor would it be appropriate to limit parties in this respect. Just like reports of investigation conducted in rate proceedings, parties should also have the opportunity to respond to the failure of the auditor to address one or more specific items. *See* Ohio Admin. Code 4901-1-28(B). Contrary to FirstEnergy's assertions, the PUCO's discovery process, allowing discovery of communications with the auditor, does not amount to parties serving as an "uber-auditor."³⁹ Review of the data requests and responses between the utility and the auditor may also lead OCC to different conclusions or recommendations than those reported by the auditor. OCC's recommendations in this proceeding will be made on behalf of residential customers who could be harmed by any anti-competitive activities of FirstEnergy that affect the competitive generation market. Examining discovery between the auditor and the company is part and parcel to what the PUCO is allowing in this case: parties may examine the auditor's conclusions, results and recommendations.

Second, FirstEnergy's problem with the breadth of OCC's requests appears to be more of a complaint about the scope of the audit. But FirstEnergy did not at any time

³⁸ *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*, Entry at ¶8 (May 17, 2017) (emphasis added).

³⁹ FirstEnergy accuses OCC of "fashioning itself as the uber auditor in this case." FirstEnergy Memo Contra at 1. FirstEnergy also alleges that OCC is seeking to "redirect the audit process and otherwise kibitz over the auditor's shoulders." *Id.* Such vitriolic hyperbole is misplaced, and is not helpful to cogent discussion of the issues here.

contest the PUCO's order setting out the scope of the audit. FirstEnergy's objections now are untimely and poorly focused.

Third, FirstEnergy mistakenly believes that it is OCC's responsibility to discuss why it needs each and every single data request and response. This approach is wrong for two reasons. First, the PUCO has rightfully held that staff data requests are "certainly relevant."⁴⁰ Second it is not OCC's responsibility to identify why each and every data request is needed. Nor could it possibly be. OCC is not privy to (and has not seen) each and every request between the utility and the auditor. FirstEnergy would be asking OCC to do the impossible. Instead, it is FirstEnergy who has the burden to establish that the requested information would not reasonably lead to the discovery of admissible evidence.⁴¹ FirstEnergy has failed to do so. The PUCO should compel the production of the documents.

C. Revised Code 4901.16 does not preclude FirstEnergy from responding to discovery requests.

FirstEnergy believes that the information that it gives to the auditor (who is an agent of the Staff) is protected from disclosure under R.C. 4901.16. It cites to a 2004 case where the PUCO held that an investigative report shared with the Staff by a utility was protected under R.C. 4901.16.⁴² It argues that disclosing the discovery between it and the auditor would "have the chilling effect of discouraging utilities from freely and openly sharing information with the Staff for fear that their confidential business information

⁴⁰ See, e.g., *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-~~418~~-EL-AIR, Entry at 3 (Aug. 23, 1991).

⁴¹ *State ex rel. Fisher v. Rose Chevrolet, Inc.*, (C.A. 1992), 82 Ohio App.3d 520, 523.

⁴² Memo Contra at 11, citing *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to Its compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry at 5 (July 28, 2004) (*CG&E Safety Case*).

(whether relevant or not) would be discoverable."⁴³ It asks the PUCO not to encourage OCC's "misuse of discovery rules."⁴⁴ Finally it claims that there is no prejudice to OCC waiting for the final audit report to be issued before it can obtain discoverable information.⁴⁵

FirstEnergy's alarmist arguments here are off-base and conveniently ignore the actual statutory language of R.C. 4901.16. FirstEnergy also closes its eyes to the PUCO precedent that has flat out rejected the notion that R.C. 4901.16 applies to utilities.⁴⁶ Accordingly, the PUCO should give no weight to FirstEnergy's arguments.

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 this statute "only prevents premature disclosure of information by the staff of the Commission. *Nothing in that section prevents the company from providing information to parties in a case.*"⁴⁷ FirstEnergy fails to explain why this precedent should not be followed. Indeed, FirstEnergy is mute when it comes to discussing the language of the statute or this PUCO holding, both of which are clearly dispositive.

⁴³ FirstEnergy Memo Contra at 12.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-**418**-EL-AIR, Entry at 3 (Aug. 23, 1991).

⁴⁷ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-**418**-EL-AIR, Entry at 3 (Aug. 23, 1991) (emphasis added) (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.)

Instead, FirstEnergy engages in a policy discussion about "the chilling effect" that OCC's discovery (or "OCC's misuse of the discovery rules"⁴⁸) will have on utilities "freely and openly sharing information with Staff." FirstEnergy uses the *CG&E Safety Case* as a springboard for its arguments. But that case is wholly distinguishable.

In the *CG&E Safety Case*, the PUCO was ruling on a public records request that was served upon it. The public records request sought to obtain from the PUCO copies of a progress report (pertaining to riser replacement) prepared by a third party, for a utility (CG&E). The utility had "on its own" contracted with the third party to conduct research.⁴⁹ The progress report was "informally provided to the staff."⁵⁰ After initially determining that the progress report should be released⁵¹ (over the utility's objections, including R.C. 4901.16), the PUCO reversed itself. The PUCO ruled that the progress report should not be released. Notably, however, the PUCO explained that "this situation involves a unique set of circumstances."⁵² The uniqueness was explained as, inter alia, an agreement between the PUCO Staff and CG&E under which CG&E agreed to provide regular reports to the PUCO Staff and the PUCO Staff agreed to continue to monitor CG&E's riser replacement and inspection activities.⁵³ The PUCO, in reaching its conclusion discussed the fact that disclosure could discourage utilities from sharing information with the staff, for fear of disclosure.⁵⁴

⁴⁸ FirstEnergy Memo Contra at 12.

⁴⁹ *CG&E Safety Case* at ¶1.

⁵⁰ *Id.* at ¶11.

⁵¹ *CG&E Safety Case*, Entry (Dec. 17, 2003).

⁵² *Id.*, Entry at ¶11 ((July 28, 2004).

⁵³ *CG&E Safety Case* at ¶11.

⁵⁴ *Id.* at ¶11.

But the facts underlying the *CG&E Safety Case* are distinguishable. In the case before the PUCO, the information being sought is part of a PUCO-ordered audit. There is nothing voluntary about the information being exchanged between the utility and the auditor. Nor is there anything informal about the arrangement between the auditor and the utility in this proceeding. While the policy of free and open sharing of information between utilities and the PUCO Staff may be important in voluntary and cooperative informal matters, its importance is greatly diminished in matters that are formal, mandatory proceedings. In fact, it makes no sense to argue that there will be a chilling effect on free and open sharing in the context of this audit.

Additionally, FirstEnergy's arguments are nonsensical when followed to their logical conclusion. FirstEnergy's view is that OCC should not be allowed discovery at this time. But if OCC is allowed discovery later, instead of now, the issue is just a matter of timing. If FirstEnergy is concerned that OCC's discovery now will have a so-called chilling effect on its willingness to freely and openly share information with the staff, later discovery (after the audit report) presents the very same issue. This type of reasoning could lead to the bizarre conclusion that all intervenor discovery should be kept secret (not discoverable), lest it discourage cooperation between the utility and the PUCO staff. Acceptance of such arguments would be wholly inconsistent with Ohio laws, including R.C. 4901.12, and 4903.082.

Finally, FirstEnergy's arguments about the lack of prejudice to OCC from waiting several months for discovery (until sometime after the audit report is issued) lack substance. FirstEnergy fails to cite any precedent (rule, law, or cases) to back up its argument. This is not surprising in the least since there is no requirement under the

PUCO rules (Ohio Adm. Code 4901-1-23) that parties must show (in their motion to compel) that they are prejudiced by the lack of discovery.

Moreover, while prejudice to OCC may not be readily apparent now, the prejudice to OCC may become more noticeable later. For instance, when the PUCO sets deadlines for responding to the audit, OCC may experience difficulty in meeting those deadlines because of the delayed discovery that FirstEnergy now seeks. This may adversely affect OCC's ability to represent residential customers on matters in this proceeding, where FirstEnergy's activities are being examined in light of Ohio's corporate separation rules and law.

D. There is no undue burden to FirstEnergy to respond to OCC's nine requests for production.

All nine of OCC's discovery requests are tied to producing documents that already exist and are a well-defined product. Primarily the document requests seek copies of document requests (and responses) between the utility and the PUCO appointed auditor. As the PUCO has recognized, it is common practice for a utility to provide parties copies of its answers to PUCO Staff data requests.⁵⁵ There is nothing extraordinary about OCC's discovery. OCC's discovery is designed to provide it with information that can assist it in representing residential customers in this case where FirstEnergy's activities are being reviewed for compliance with Ohio laws and rules on corporate separation. This matters to the residential customers in Ohio because these customers depend on a functioning competitive market for reasonably priced generation service. A competitive market cannot properly function if parties in the market are engaged in activities that create an

⁵⁵ See, e.g., *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs*, Case No. 91-418-EL-AIR, Entry at 3 (Aug. 23, 1991).

uneven playing field. Hence, it is important to the residential customers that FirstEnergy follow Ohio law and rules and not engage in anti-competitive activities.

And even though the documents may require FirstEnergy to provide 300 (or 245 with subparts) requests (and responses), FirstEnergy has not shown that it is unduly burdensome to do so. Rather FirstEnergy merely opines that it should not have to produce the documents now (as opposed to never). Conspicuously absent from its pleading is any allegation that production would be unduly burdensome. But the burden falls on the party resisting discovery to clarify and explain its objection and to provide support for the objections.⁵⁶ FirstEnergy has failed to do so. The PUCO should overrule FirstEnergy's objections on this ground.

E. Conclusion.

Under Ohio law and the PUCO rules of discovery, OCC is entitled to discovery in this docket. In fact, the PUCO rules encourage prompt and expeditious use of discovery. Yet, FirstEnergy seeks to unduly delay discovery. It wants to arbitrarily choose a future date to respond to OCC's discovery, a date well beyond the twenty-one days it is afforded under PUCO rules. Allowing FirstEnergy to disrupt the discovery process may prejudice customers by delaying OCC's analysis of whether FirstEnergy is complying with corporation separation rules and laws -- which are intended to protect customers from anti-competitive practices that harm the competitive markets customers rely upon to achieve reasonably priced generation service.

⁵⁶ *Gulf Oil Corp. v. Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

While FirstEnergy characterizes OCC's discovery as "second guessing the auditor,"⁵⁷ and interfering with the audit process,⁵⁸ these claims bear no resemblance to reality. OCC's nine discovery requests seek information that is relevant and will help OCC to advocate for the interests of its clients, the residential customers of FirstEnergy. In fact, it is common practice for a utility to provide parties copies of its answers to PUCO Staff data requests.

There is nothing that is overly broad or unduly burdensome about OCC's nine discovery requests. Granting OCC's motion to compel will not, contrary to FirstEnergy assertions, upset the "free flow of information between the Companies and the Staff."⁵⁹ Instead it will allow OCC access to information that bears upon whether the utility is engaging in practices that are harmful to customers and the markets they depend upon to achieve reasonably priced electric service. The PUCO should grant OCC's Motion to Compel.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Willis

Maureen R. Willis (0020847)

Counsel of Record

Senior Regulatory Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215-4213

Telephone: Willis Direct – 614-466-9567

Maureen.willis@occ.ohio.gov

(Will accept service via email)

⁵⁷ FirstEnergy Memo Contra at 13.

⁵⁸ FirstEnergy Memo Contra at 1, 11.

⁵⁹ FirstEnergy Memo Contra at 13.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the persons stated below
via electronic transmission, this 20th day of April 2018.

/s/ Maureen R. Willis
Maureen R. Willis
Senior Counsel

SERVICE LIST

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

Attorney Examiners:
Megan.addison@puc.state.oh.us
Gregory.price@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/20/2018 2:09:48 PM

in

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

Summary: Reply Reply in Support of Motion to Compel Responses to Discovery by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Willis, Maureen Mrs.