

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

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## **TABLE OF CONTENTS**

	<b>PAGE</b>
I. INTRODUCTION .....	1
II. RECOMMENDATIONS .....	3
A. Under Ohio law and the PUCO’s rules, a party’s discovery of information about a utility’s charges – including discovery by the state-designated advocate for consumers – can begin immediately after a proceeding has commenced. ....	3
B. OCC's discovery requests are relevant and not overly broad. ....	10
C. Revised Code 4901.16 does not preclude FirstEnergy from responding to discovery requests. ....	12
D. There is no undue burden to FirstEnergy to respond to OCC's six requests for production. ....	15
III. Conclusion .....	16

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## I. INTRODUCTION

At issue is whether FirstEnergy is properly earmarking its charges under the DMR. The PUCO required that FirstEnergy use these customer funds “directly or indirectly in support of grid modernization.”<sup>3</sup> But unfortunately for customers, the PUCO

<sup>3</sup> In re the Application of Ohio Edison Co., et al., to establish an ESP., Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶202 (October 12, 2016).

did not require FirstEnergy to spend its distribution modernization rider charges on distribution modernization. Instead, the DMR was designed to provide credit support to FirstEnergy Corp, allowing FirstEnergy to potentially collect, from customers, an unlawful subsidy of power plants held by its affiliate, FirstEnergy Solutions.<sup>4</sup>

By Entry issued on December 13, 2017, the PUCO initiated this proceeding to review FirstEnergy's expenditures regarding DMR charges.<sup>5</sup> In addition, the PUCO explicitly authorized parties to conduct discovery.<sup>6</sup> On March 14, 2018, the Office of the Ohio Consumers' Counsel ("OCC") intervened in this proceeding on behalf of FirstEnergy's 1.9 million residential customers.<sup>7</sup> As provided for under Ohio law and the PUCO's rules, OCC sent discovery requests to FirstEnergy for purposes of advocating for consumers in the case. FirstEnergy refused to answer the discovery of OCC, the state-designated advocate for FirstEnergy's consumers. Unfortunately, after numerous attempts OCC was unable to resolve its discovery dispute with FirstEnergy. On June 21, 2018, OCC sought intervention from the PUCO in this dispute through its motion to compel discovery.<sup>8</sup>

In response, FirstEnergy erroneously asserts: OCC is not entitled to discovery; OCC's discovery requests are untimely, irrelevant and unduly burdensome; under R.C. 4901.16 FirstEnergy is prohibited from producing the information. But, FirstEnergy's assertions misapply PUCO rules regarding discovery. Thus, OCC respectfully requests

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<sup>4</sup> *Id.* ¶ 185.

<sup>5</sup> Entry (December 13, 2017).

<sup>6</sup> *Id.* ¶ 9; RFP at III B.

<sup>7</sup> The OCC serves as the statutory representative of Ohio residential public utility customers under R.C. 4911.

<sup>8</sup> *See* Motion to Compel Response to Discovery by the OCC (June 21, 2018).

the PUCO grant its motion to compel and order FirstEnergy to expeditiously respond to OCC's discovery requests.

## II. RECOMMENDATIONS

**A. Under Ohio law and the PUCO's rules, a party's discovery of information about a utility's charges – including discovery by the state-designated advocate for consumers – can begin immediately after a proceeding has commenced.**

FirstEnergy supports its tactics of delay by asserting that "OCC is not entitled to discovery now."<sup>9</sup> FirstEnergy's assertion is premised on its belief that because there is no procedural schedule, no right to discovery exists. FirstEnergy cites to a 2006 rules case<sup>10</sup> 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*.<sup>11</sup> The PUCO also held that such a broad definition would usurp its discretion to conduct proceedings as it deems fit and would delay the outcome of many cases.<sup>12</sup>

Here though it is FirstEnergy that seeks to usurp the PUCO's discretion to conduct its proceedings (and thwart OCC's performance of its public duties for consumer). It does so by unilaterally deciding that no right to discovery exists before the Auditor issues its

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<sup>9</sup> Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra the Motion to Compel of The Office of the Ohio Consumers' Counsel (June 6, 2018) at 4 ("FirstEnergy Memo Contra").

<sup>10</sup> *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).

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

<sup>12</sup> 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).

final report (or some undefined time thereafter).<sup>13</sup> 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 and participate in this proceeding on behalf of consumers to ensure the PUCO has a fair process and a full record before it. 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 properly earmarking money it is collecting from customers. 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. Conducting discovery now, as allowed by law and rule, will assist OCC in addressing consumer issues regarding the audit of the charges that consumers are paying. 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."<sup>14</sup> Allowing discovery now will also better assist the PUCO's review of the audit report in this case.

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<sup>13</sup> FirstEnergy Memo Contra at 9 (urging that OCC be required to wait for a report from the Auditor that will "define the scope" of the proceeding).

<sup>14</sup> Entry at ¶9; RFP at III B.

Allowing discovery to go forward now is also consistent with R.C. 4903.082. That statute was enacted decades ago, during the 1982 reforms, to establish the discovery rights that FirstEnergy continues to thwart all these years later. Under that statute, "parties and intervenors shall be afforded ample rights of discovery." While FirstEnergy contends that this statute does not require the PUCO to allow for discovery in all matters, (FirstEnergy Memo Contra at 6), 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* case<sup>15</sup> is distinguishable from the case at hand. The second case FirstEnergy relies upon<sup>16</sup> was superseded to a large degree by the Supreme Court of Ohio's ("Court") ruling in *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384.

In the *East Ohio Gas Co. PIPP* case<sup>17</sup> cited by FirstEnergy, the application under review was subject to a 45-day automatic approval process. 20 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 motion to compel should also be denied.<sup>18</sup> 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. PIPP* holding inapplicable.

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<sup>15</sup> *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-PIPP, Entry on Rehearing (Mar. 7, 2006).

<sup>16</sup> *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).

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

<sup>18</sup> *Id.*, Entry at ¶6 (Feb. 1, 2006); Entry on Rehearing at ¶11 (Mar. 7, 2006).

And with respect to the *Cinergy Merger* proceeding<sup>19</sup> that FirstEnergy relies upon, the PUCO's holdings there have been greatly diminished by a later holding of the 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

But approximately ten months after the PUCO rulings in the *Cinergy Merger* case, the 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 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

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<sup>19</sup> *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).

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.*, Entry on Rehearing at ¶14 (Dec. 7, 2005).

<sup>22</sup> *Id.*



persons with a real and substantial interest in the proceedings can be considered by the PUCO."<sup>23</sup>

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."<sup>24</sup> 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."<sup>25</sup> Second, FirstEnergy opines that the discovery request must have some relationship to relevant

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<sup>23</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, ¶20.

<sup>24</sup> FirstEnergy Memo Contra at 5.

<sup>25</sup> *Id.*

issues.<sup>26</sup> 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."<sup>27</sup>

FirstEnergy is wrong. The PUCO has refused to adopt these limitations previously on parties' rights to discover information about a utility's charges or operations. In a recent complaint case filed by OCC, the PUCO held that "there is no basis in our rules for a party to stymie discovery."<sup>28</sup> In that recent case, Duke Energy sought to withhold discovery until its motion to dismiss was ruled on.<sup>29</sup> The PUCO granted the motion to dismiss but noted that there was no support in the Ohio Administrative Code to prevent discovery once a proceeding has commenced.<sup>30</sup>

In fact, allowing discovery to go forward now (instead of waiting for the Auditor's report) is supported by 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.<sup>31</sup> As a party in this case, OCC represents the interests of residential customers who could be harmed if FirstEnergy has not used the

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<sup>26</sup> *Id.* at 6.

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

<sup>28</sup> *In the Matter of the Complaint of OCC v. Duke*, Case No. 15-1588-GE-CSS, Entry at fn. 2 (Oct. 11, 2017)

<sup>29</sup> *Id.* ¶13.

<sup>30</sup> *Id.* at fn. 2.

<sup>31</sup> *See* Ohio Adm. Code 4901-1-16(H).

money collected from customers for grid modernization. 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 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."<sup>32</sup> 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 \*\*\*").<sup>33</sup>

The PUCO should also reject FirstEnergy's proposed "limiting principles to the standard for proper discovery."<sup>34</sup> 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

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<sup>32</sup> Ohio Adm. Code 4901-1-16(B).

<sup>33</sup> *Id.*

<sup>34</sup> FirstEnergy Memo Contra at 5-6.

events, as FirstEnergy seeks to do (in delaying discovery until an audit report is issued).<sup>35</sup> Contrary to FirstEnergy's assertions otherwise<sup>36</sup> complaint cases *do not require a hearing*. Hearings in complaint cases are only held "if it appears reasonable grounds for complaint are stated."<sup>37</sup> Thus, the fact the PUCO has allowed discovery to go forward in 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 "overbroad"<sup>38</sup> FirstEnergy supports this assertion because the scope of the proceeding will be defined by the audit report.<sup>39</sup> FirstEnergy also asserts that OCC's role in this matter will be to review and comment on any conclusions, results or recommendations by Oxford.<sup>40</sup> FirstEnergy claims that OCC has not discussed why it needs discovery at this time.<sup>41</sup> The PUCO should reject all of these arguments.

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<sup>35</sup> 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. 2 (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).

<sup>36</sup> FirstEnergy Memo Contra at 6, mistakenly asserting that "in complaint cases, *because there was going to be a hearing*, discovery and evidence are clearly contemplated and proper." (emphasis added).

<sup>37</sup> See R.C. 4925.06 ("if it appears that reasonable ground for complaint are stated, the commission shall fix a time for hearing").

<sup>38</sup> FirstEnergy Memo Contra at 9.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.* at 7.

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:

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.*<sup>42</sup>

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.<sup>43</sup> 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 improper spending of FirstEnergy as it relates to money collected from customers under DMR. Examining discovery between the auditor and the utility 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 contest the PUCO's order setting out the scope of the audit. FirstEnergy's objections now are untimely and poorly focused.

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<sup>42</sup> *In the Matter of the Review of The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Entry at ¶8 (May 17, 2017) (emphasis added).

<sup>43</sup> See Ohio Admin. Code 4901-1-28(B).

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."<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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

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<sup>44</sup> 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).

<sup>45</sup> *State ex rel. Fisher v. Rose Chevrolet, Inc.*, (C.A. 1992), 82 Ohio App.3d 520, 523.

<sup>46</sup> Memo Contra at 10, 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*).

(regardless of relevance) would be discoverable."<sup>47</sup> In addition it asks the PUCO not to encourage OCC's "misuse of discovery rules."<sup>48</sup>

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.<sup>49</sup> 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.*"<sup>50</sup> 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.

Instead, FirstEnergy engages in a policy discussion about "the chilling effect" that OCC's discovery (or "OCC's misuse of the discovery rules"<sup>51</sup>) will have on utilities

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<sup>47</sup> FirstEnergy Memo Contra at 10.

<sup>48</sup> *Id.* at 11.

<sup>49</sup> *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).

<sup>50</sup> *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.)

<sup>51</sup> FirstEnergy Memo Contra at 10-11.

"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.<sup>52</sup> The progress report was "informally provided to the staff."<sup>53</sup> After initially determining that the progress report should be released<sup>54</sup> (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."<sup>55</sup> 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.<sup>56</sup> The PUCO, in reaching its conclusion discussed the fact that disclosure could discourage utilities from sharing information with the staff, for fear of disclosure.<sup>57</sup>

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

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<sup>52</sup> *CG&E Safety Case* ¶1.

<sup>53</sup> *Id.* ¶11.

<sup>54</sup> *CG&E Safety Case*, Entry (Dec. 17, 2003).

<sup>55</sup> *Id.*, Entry ¶11 ((July 28, 2004).

<sup>56</sup> *CG&E Safety Case* ¶11.

<sup>57</sup> *Id.* at ¶11.



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.

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

All six 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.<sup>58</sup> There is nothing unusual 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 the PUCO's order regarding DMR. This matters to the residential customers where FirstEnergy is collecting \$168 million a year for distribution modernization that does not have to actually be spent on distribution modernization.

FirstEnergy has not shown that it is unduly burdened by OCC's requests. 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 (FirstEnergy) resisting discovery to clarify and explain its objection and to provide support for the objections.<sup>59</sup> FirstEnergy has failed to do so. The PUCO should overrule FirstEnergy's objections on this ground.

### **III. CONCLUSION**

Under Ohio law and the PUCO's rules of discovery, OCC is entitled to discovery in this docket for its advocacy on behalf of nearly two million FirstEnergy consumers. In fact, the PUCO rules encourage prompt and expeditious use of discovery. Yet, FirstEnergy seeks to unduly delay answering the consumer advocate's discovery about the millions of dollars in subsidy charges that consumers are paying. FirstEnergy wants to arbitrarily choose a future date to respond to OCC's discovery, a date well beyond the 20

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<sup>58</sup> 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).

<sup>59</sup> *Gulf Oil Corp. v. Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

days it is afforded under PUCO rules. Allowing FirstEnergy to disrupt the discovery process can prejudice customers by delaying OCC's analysis of whether FirstEnergy is complying the PUCO's order as it pertains to the distribution modernization rider.

OCC's six discovery requests seek information that is relevant and will help OCC to advocate for the interests of its statutory 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 six 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."<sup>60</sup> 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. And protecting the right to discovery under law and rule will further the PUCO's interest in a fair process and a just result in the case. The PUCO should grant OCC's Motion to Compel.

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<sup>60</sup> FirstEnergy Memo Contra at 11.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply was served on the persons stated below  
via electronic transmission, this 13th day of July 2018.

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